TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 220.

KOMADA & CO., PETITIONER,

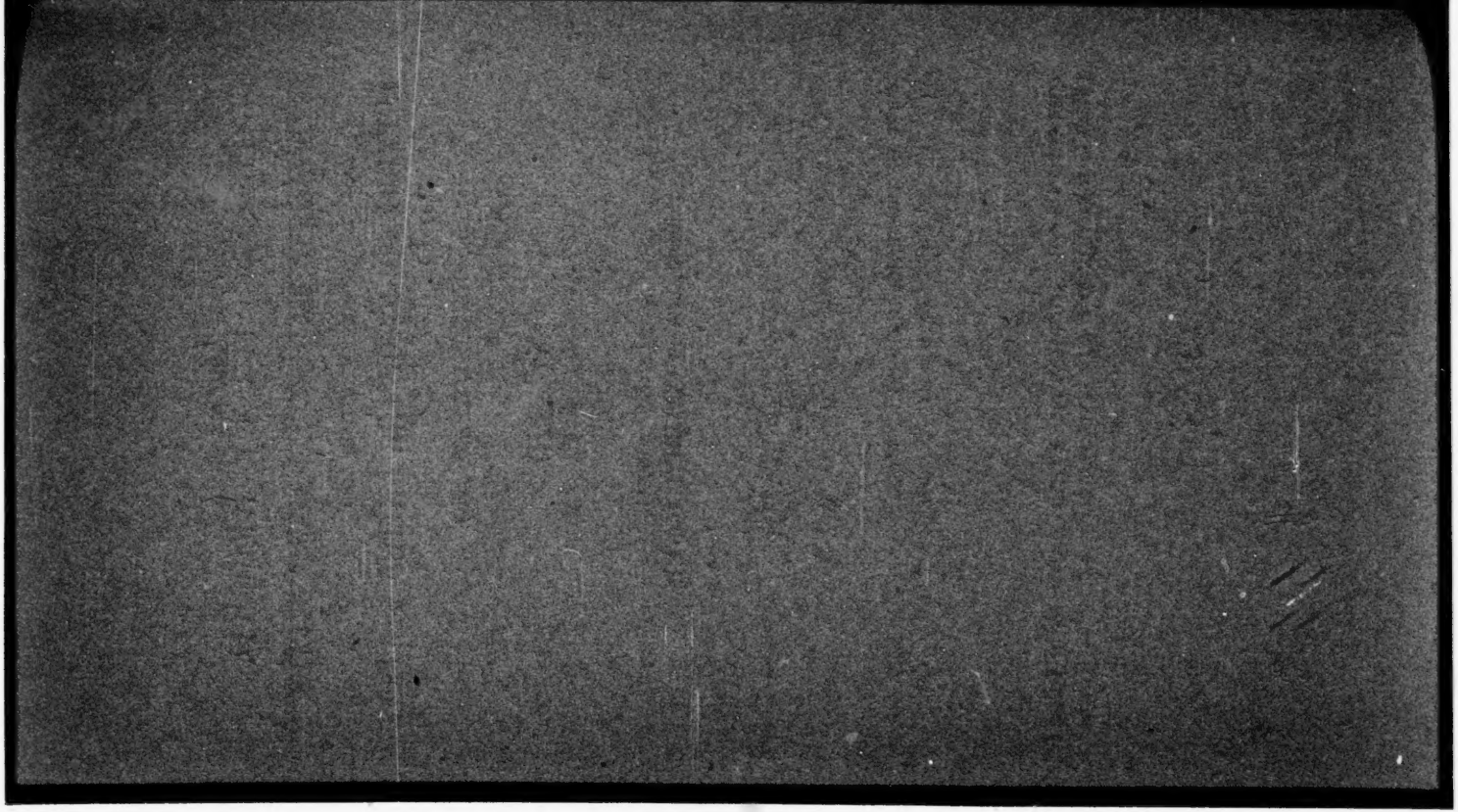
vs.

THE UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

PETITION FOR CERTIORARI FILED AUGUST 1, 1900.
CERTIORARI AND RETURN FILED MARCH 26, 1900.

(21,284.)



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a CONDENSED TRANSCRIPT OF RECORD.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 1361.

THE UNITED STATES OF AMERICA, Appellant,
vs.
KOMADA & CO., Appellee.

Upon Appeal from the United States Circuit Court for the Northern District of California.

Stanley Jackson, Attorney for Appellees.
Thomas Fitch, Percy W. Crane, of Counsel for Appellees.
Robert T. Devlin, United States Attorney.

1 United States Circuit Court of Appeals for the Ninth Circuit.

THE UNITED STATES OF AMERICA, Appellant,
v.
KOMADA & COMPANY, Appellee.

Condensed Transcript of Record

Upon Appeal from the United States Circuit Court for the Northern District of California.

Stipulation.

Whereas, the record in the above entitled cause, heretofore filed, is unnecessarily large and somewhat confused in arrangement, and it seems desirable that the same be condensed, and, so far as practicable, reduced to narrative form, counsel stipulate that the attached Condensed Record shall be substituted for the original now on file, and be printed under their direction, and that it shall be treated in all respects as though it had come up from the Court below, duly authenticated by the Judge and Clerk, under seal.

Counsel further agree to ask the Court to give effect to this stipulation by directing a proper decree.

ROBT. T. DEVLIN,
U. S. Attorney.
J. C. McREYNOLDS,
Of Counsel for the United States.
THOMAS FITCH,
PERCY W. CRANE,
Of Counsel for Komada & Co.
STANLEY JACKSON,
Attorney for Appellees.

October 7th, 1907.

1—220

2 United States Circuit Court of Appeals for the Ninth Circuit.

THE UNITED STATES OF AMERICA, Appellant,
v.
KOMADA & COMPANY, Appellee.

Upon motion of Robert T. Devlin, Esq., attorney for the United States, and presentation by him of the stipulation of counsel agreeing to substitute the Condensed Record annexed thereto for the one now on file, it is

Ordered, that the substitution be made, and that said Condensed Record shall be printed under direction of Counsel, and treated in all respects as provided in their stipulation.

In the Circuit Court of the United States for the Northern District of California.

THE UNITED STATES, Appellant,
v.
KOMADA & COMPANY, Appellees.

Petition for Review of General Appraisers' Decision.

Frederick S. Stratton, Collector of Customs for the Port of San Francisco, California, by Robert T. Devlin, Attorney for the United States for the Northern District of California, his attorney, complains and says that he is dissatisfied with a certain decision, dated October 26, 1905, of the Board of United States General Appraisers at New York, as provided for in Section fourteen of the Act of Congress approved June 10, 1890, entitled "An Act to simplify the laws
3 in relation to the collection of revenues," the same being a decision as to the construction of the law and facts respecting the classification of certain merchandise and the rate of duty imposed thereon under such classification, that is to say, certain sake imported ex vessel "Korea" at said Port of San Francisco, and entered on November 25, 1904, per entries numbered 15098A and 15098B respectively, on the mentioned date by Komada & Company, and classified by this claimant as such Collector as still wines and assessed with duties accordingly at the rate of fifty cents per gallon under such classification, and under Paragraph 296 of the Act of Congress approved July 24, 1897, entitled "An Act to provide revenue for the Government and to encourage the industries of the United States." and further that the foregoing matter has arisen within the Northern District of California.

And thereupon this Complainant makes this application to this Honorable Court for a review of the questions of law and fact involved in the said decision of the said Board of General Appraisers, and for a statement of the errors of law and fact complained of assigns the following:

Errors of Law.

1. That the said Board erred in deciding that the said merchandise was not properly classified by this complainant as such Collector, as still wines, and that the ascertainment and liquidation of the duties thereon by this complainant at the rate of fifty cents per gallon as aforesaid, under such classification under Paragraph 296 of the last mentioned Act of Congress was therefore erroneous.

4 2. The said Board erred in not deciding that the said merchandise was properly classified by this complainant as still wines and dutiable at the rate of fifty cents per gallon under Paragraph 296 of the Act of Congress last mentioned.

3. The said Board erred in deciding that the said merchandise was articles manufactured in whole or in part, not provided for in the Act of Congress last mentioned, and therefore dutiable at the rate of twenty per centum ad valorem under Section Six of the last mentioned Act of Congress.

Errors of Fact.

1. Said Board erred in deciding that the said merchandise was articles manufactured in whole or in part, not provided for in the Act of Congress last mentioned, and therefore dutiable under Section Six of the last mentioned Act of Congress.

2. Said Board erred in not deciding that the said merchandise was still wnes and therefore dutiable under Paragraph 296 of the last mentioned Act of Congress.

In consideration whereof, this complainant prays this Honorable Court to order the said Board of General Appraisers at New York, to forthwith return to this Court the record of the proceedings heretofore had before them, respecting the matters herein complained of, and the evidence taken by them concerning the same, together with a certified statement of the facts involved in the case and their decisions thereon.

F. S. STRATTON, *Collector.*
ROBT. T. DEVLIN,
United States Attorney.

5 Upon application after the foregoing petition was filed the Court issued the usual order in harmony therewith and the Board made due return accompanied by a transcript of testimony taken and the exhibits presented, and also the protest of importers, report of the Collector and opinion and judgment of the Board, copies of the last three of which follow:

Protest 147,545 (7069).

SAN FRANCISCO, *Jan.* 3, 1904.

To the Collector of Customs, District and Port of San Francisco.

SIR: We hereby protest against the liquidation of our entry, and the assessment and payment of duties as exacted by you on certain

sake classified by you as Still Wine, marks and numbers said to be S I S 30-31-32 564 csks. 200 cs., but this protest is intended to cover and apply to all the goods of the same kind and character mentioned in the invoice or entry, whether specifically mentioned herein or not.

Said merchandise was imported by us on the 25th day of Nov., 1904, in the Korea, from Hong Kong, and is more fully described in Consumption Entry No. 15098.

The grounds of our objections are that said sake is not dutiable at 50 cents per gallon, or at $1.60 per case, but is entitled to entry as,

1st. An article manufactured in whole or in part, not provided for, at 20 per cent ad valorem, Section 6, Act of July 24, 1897, or

2nd. Malt Extract, fluid, that in casks at 20 cents per gallon, that in bottles at 40 cents per gallon. Par. 298 and Section 7 of Act of July 24, 1897, or

6 3rd. As Ale, Beer or Porter at 20 cents per gallon in bulk, and 40 cents per gallon in bottles under Par. 297 and Section 7, same Act, or

4th. The sake in casks, if a still wine, is entitled to entry at 40 cents per gallon as still wine containing not over 14 per cent. alcohol. Par. 296 same Act.

We pay the amount solely to obtain possession of the goods, and claim that the entry should be readjusted and the amount overcharged refunded to us.

KOMADA & CO.,
No. 517 Dupont St.

(Endorsed:) Entry No. 15098. Protest 147545. Vessel Korea, from Hong Kong. Date of arrival, Nov. 25, 1904. Date of entry, Nov. 28, 1904. Date of liquidation, Dec. 29, 1904.

Filed Jan. 3, 1905.

Report of Collector.

CUSTOM-HOUSE,
PORT OF SAN FRANCISCO, *Jan.* 5, 1905.

I submit herewith the protest described below with the accompanying invoice and entry against my assessment of duty at 50 cents a gallon and $1.60 a dozen on certain Sake claimed to be mf. art. N. O. P. 20 per cent. Sec. 6, etc., returned by the Appraiser as Still Wine and assessed with duty under Par. 396, Act of July 24, 1897, in accordance with —— ruling of —— ——.

The requirements of Section 14, Act of June 10, 1890, have been complied with by the protester. Protest and two invoices herewith, samples at Board.

W. B. HAMILTON,
Special Deputy Collector of Customs.

7 *Decision of the Board.* *G. A.* 6182 (*T. D.* 26810).

UNITED STATES GENERAL APPRAISERS,
NEW YORK, *October* 26, 1905.

In the matter of Protest 147,545 of KOMADA & Co. Against the Assessment of Duty by the Collector of Customs at the Port of San Francisco.

Before Board 3—Waite, General Appraiser.

This protest raises the question whether the Japanese beverage known as "Sake" shall be dutiable at the rates applicable to still wines, under paragraph 296, tariff act of 1897, as contended in behalf of the government, or, shall be assessed as an unenumerated manufactured article, under section 6, or, by similitude, at the rates imposed on beer, ale or porter, by paragraph 297, which are the claims relied upon by the importers.

The matter has already been the subject of litigation. The Board held sake to be so far similar to still wine as to require its classification at the wine rate, under the operation of section 7 of the act. In re Hackfeld, G. A. 5334, T. D. 24410. Since that decision both the circuit court for the southern district of New York and the Circuit Court of Appeals for the Second Circuit have ruled differently, holding sake to be dutiable as an unenumerated manufactured article under section 6. *Nishimiya v. United States,* 131 Fed. Rep., 650 (T. D. 25386); *United States v. Nishimiya,* 137 Fed. Rep. 396 (T. D. 26155).

8 A new case has been made up and much additional evidence taken. This evidence, in our opinion, warrants a difference of opinion as to the dutiable status of the article and makes the case a proper one for the application of the doctrine of *stare decisis.* We should not feel warranted in holding that the present case is sufficiently differentiated from the Nishimiya case to authorize a departure from the rulings of the courts.

The claim for assessment at 20 per cent advalorem, under section 6 of the act is sustained and the collector's decision reversed to this extent. In all other respects the protest is overruled.

Additional proof was taken before the Circuit Court, which, with that taken before the Board, appears hereinafter in the summary of evidence.

The cause was heard before the Circuit Court, Hon. William W. Morrow, Judge, in July, 1906, at San Francisco. At the conclusion of the oral argument, the Court announced that as the cause would be properly heard *de novo* upon appeal, it would follow the decision of the Circuit Court of Appeals in New York in *United States v. Nishimiya,* 137 F. R., 396, and act *pro forma;* and without further examination of the record, affirmed the action of the Board, and announced orally the opinion reported in 148, Federal Reporter, page 125, printed hereinafter at page 240.

Thereafter, on the 11th day of July, 1906, an order was entered directing judgment affirming the decision of the Board of General Appraisers and dismissing the petition, with instruction to prepare and submit findings.

9 The order for judgment, findings approved by the Court, and judgment entered thereon July 14th 1906, follow:

Order for Judgment, etc.

The parties hereto being represented by their counsel as on yesterday, the hearing hereof was thereupon resumed, and after argumnt by counsel for the respective parties, was submitted to the Court for consideration and decision. Thereupon, it was ordered by the Court that the decision of the Board of United States General Appraisers, sought to be reviewed herein be and the same hereby is affirmed, and this petition dismissed, and that findings and decision be filed and judgment thereon entered herein accordingly; counsel for importer to prepare and submit findings.

Findings of Fact and Conclusions of Law.

This cause and proceeding having come on regularly for hearing and determination before the Court in the manner provided by law and the Act of Congress of June 10th, 1890, Robert T. Devlin, Esq., U. S. Attorney, B. A. Levett, Esq., Special Assistant U. S. Attorney appearing for the collector, and Stanley Jackson, Esq., attorney for Komada & Co., Thomas Fitch, Esq., of counsel appearing for the importer, and Henry C. Dibble, Esq., appearing as counsel for certain other importers interested in the issue involved in this proceeding; and evidence, oral and documentary, on behalf of appellant and respondent having been introduced, heard and considered, and the Court after duly considering the law and the evidence, and

10 being fully advised in the premises, having heretofore, on the eleventh day of July, 1906, given and rendered its opinion herein;

Now, in accordance therewith, hereby makes and renders its decision, finding the following facts and conclusions of law respecting the classification of the merchandise involved herein, and the rate of duty imposed thereon under such classification:

Findings of Fact.

I.

The merchandise in question, consisting of 200 cases and 564 tubs of the article hereinafter mentioned, and described in the invoices as "sake," was imported by Komada & Co. from —— in the Empire of Japan, into the United States of America, at the port of San Francisco, State and Northern District of California, on the 25th day of November, 1904, by the S. S. "Korea," and thereupon said merchandise was entered at the custom-house at said port for immediate consumption.

II.

That thereafter said merchandise was by Frederick S. Stratton, as collector of said port, classified upon the return of the appraiser of said port as follows: The "sake" in bottles was classified as "still wine," dutiable at the rate of $1.60 per case and the "sake" in tubs was classified as "still wine" containing more than fourteen per-centum of absolute alcohol dutiable at the rate of fifty cents per gallon, both under paragraph 296 of the Tariff Act of July 24th, 1897; and said entries were liquidated in accordance with such classification and the duty upon said cases and tubs of said
11 merchandise so entered for immediate consumption as aforesaid, amounting to the sum of $— was ascertained, levied, and collected by said collector.

III.

That thereafter said importer, being dissatisfied with such decision of the Collector and said classification of the merchandise involved herein, made and gave due protest and notice of such dissatisfaction on the ground that the merchandise in question is not a "still wine" nor dutiable as such, but should be admitted as

1st. An article manufactured in whole or in part, not provided for at twenty per cent. ad valorem, under section 6, Act of July 24, 1897; or

2nd. Malt extract, fluid, that in casks at twenty cents per gallon, that in bottles at forty cents per gallon, under paragraph 298 and section 7 of the same act; or

3d. As ale, beer, or porter at twenty cents per gallon, in bulk, and forty cents per gallon in bottles, under paragraphs 297 and section 7 of the same act; or

4th. The "sake" in casks, if a still wine is entitled to entry at forty cents per gallon as still wine, containing not over 14 per cent. alcohol under paragraph 296 of the same act.

Thereupon the invoice relating to the importation of said merchandise and all the papers and exhibits connected therewith, were duly transmitted to the Board of United States General Appraisers on duty at the port of New York, all as provided in said Customs administrative Act of June 10th, 1890.

12 IV.

That thereafter, on the twenty-sixth day of October, 1905, the said Board of United States General Appraisers, after taking evidence therein, made and rendered their decision in said matter, reversing the decision of said collector and sustaining said protest in so far as it claimed that said "sake" was dutiable as an article manufactured in whole or in part, not provided for, at twenty per cent. ad valorem under section 6 of said act of July 24, 1897, and holding and deciding that said sake was not dutiable at the rates applicable to still wines under paragraph 296 of said act, but was and is an article manufactured in whole or in part, not provided for, and subject to a

duty of twenty per cent ad valorem, under section 6 of said act of 1897.

V.

That thereafter in due and proper time, the said collector being dissatisfied with said decision of the said Board of United States General Appraisers as to the construction of the law and the facts respecting the classification of such merchandise and the rate of duty imposed thereon under such classification and in manner and form as required by law and section 15 of said act of June 10th, 1890, applied to this Court for a review of the questions of law and fact involved in such decision of the said Board of General Appraisers; and such proceedings were thereupon had that further evidence was duly taken before a referee appointed by this Court, and introduced and considered herein as heretofore stated.

13

VI.

That the merchandise comprising the importation involved in this application and petition for review on and before the said 25th day of November, 1894, and at all times was, and now is, known in trade and commerce as "sake," and said merchandise is "sake."

VII.

That said merchandise was not and is not still wine or any wine, and was not and is not dutiable as a still wine or any wine by similitude or otherwise, but said merchandise was and is a manufactured article and not provided for in said act of July 24th, 1897, otherwise than under section 6 of said act at twenty per cent ad valorem.

VIII.

That said merchandise was not, nor is it, a spirituous beverage and said merchandise was not at any time and is not commonly, commercially, chemically or otherwise known as a spirituous beverage or a wine.

Conclusions of Law.

And as conclusions of law the Court finds:

I.

That this Court has jurisdiction of the matter involved herein.

II.

That the merchandise in question is embraced within the terms and subject to the provisions of section 6 of the Tariff Act of
14 July 24th, 1897; and is dutiable thereunder as a manufactured article at twenty per cent. ad valorem and not otherwise.

III.

The decision of the Board of United States General Appraisers herein is hereby affirmed, and the action of said collector in assessing and liquidating the amount of duties as aforesaid is hereby held to be erroneous.

IV.

The importer, Komada & Co., is entitled to a judgment for excess duties collected without costs.

Let judgment be entered in accordance herewith.

WM. W. MORROW, *Judge.*

Judgment.

This matter having come on regularly for hearing before the Court upon the pleadings and the proofs taken and filed herein, counsel for petitioner and for the respondent appearing, and the same having been argued and submitted to the Court for consideration and decision, and the Court, after due deliberation, having filed its findings and decision in writing, and ordered that judgment be entered herein in accordance therewith:

Now, therefore, by virtue of the law and by reason of the findings and decision aforesaid, it is considered by the Court that the merchandise in question in this matter is embraced within the terms and subject to the provisions of section 6 of the Tariff Act of July 24, 1897, and is dutiable thereunder as a manufactured article not otherwise provided for in said act at twenty per centum ad valorem, and not otherwise.

It is further considered and adjudged that the decision of the Board of United States General Appraisers herein sought to be reviewed be and the same hereby is, affirmed and sustained;

And it is further considered and adjudged that the action of the Collector of Customs for the Port of San Francisco, in assessing and liquidating the amount of duties upon the merchandise in question herein, be, and it hereby is, held to be erroneous.

Entered July 14, 1906.

An appeal to this Court was duly prayed, and perfected, an order entered allowing the withdrawal of the exhibits and transmission of the same to this Court and proper notices served on appellant.

With the application for appeal, the following assignment of errors was filed:

Assignment of Errors.

The United States hereby assigns errors to the decision and judgment of the Circuit Court of the United States, for the Northern District of California herein in the following particulars:

I.

In that it decided and adjudged that the decision of the Board of United States General Appraisers should not be reversed, on the

ground that the merchandise involved in this appeal was dutiable as a non-enumerated manufactured article under section 6 of the Tariff Act of 1897.

16 II.

In that it did not decide and adjudge that said merchandise was dutiable by reason of its similarity in material, texture, quality, or the use to which it may be applied, to still wines under the provisions of paragraph 296 of the Tariff Act of 1897 (30 Stats. at L. 151), by virtue of section 7 of said act.

III.

In that it did not decide and adjudge that said merchandise was dutiable by reason of its similarity in material, texture, quality, or the use to which it may be applied to ale, porter, or beer under the provisions of paragraph 297 of the Tariff Act of 1897 (30 Stats. at L. 151) by virtue of section 7 of said act.

IV.

In that it did not decide and adjudge that said merchandise was dutiable as a spirituous beverage under the provisions of paragraph 292 of said act.

V.

In that it did not decide and adjudge that said merchandise was dutiable under some paragraph of said act other than the paragraphs claimed in the protest against the decision of the collector of customs at San Francisco, filed by the appellees.

San Francisco, July 24th, 1906.

A transcript of the record was properly made up and with the exhibits duly filed here August 23rd, 1906.

17 EXHIBITS.

The following described articles shall be treated as parts of this record and may be referred to by the Court for any purpose relating to the cause and be relied upon by either party—

1. Bottles of recently made and imported sake, which it is admitted are the same in all respects as the liquid originally imported by Komada & Company and made the subject of the protest now under consideration. Each bottle is marked "Exhibit 1."

2. Bottles of sake which *was* originally imported by Komada & Company in 1905 and made the subject of protest, and placed in these bottles in February, 1906, each bottle being marked "Exhibit 2."

3. Bottles of "Jimenez & Lamothe" sherry wine, each of which is marked "Exhibit 3." It is agreed that this liquid is a true sherry wine made from grapes in Spain; that it was specially imported at the instance of the Government's counsel for the purposes of this

case, and so far as counsel know, it is not in general use in the United States; and that upon importation it would be correctly classified under Paragraph 296 of the Tariff Act of July 24th, 1897, as a still wine, and assessed for duty according to the provisions of that paragraph.

4. Bottles of "Duff Gordon" sherry wine, which upon importation would be properly classified under paragraph 296 of the Tariff Act of July 24th, 1897, as still wine and assessed for duty according to the provisions of that paragraph. Each of these bottles is marked "Exhibit 4."

18 5. A small cup which is often used by Japanese in drinking sake, marked "Exhibit 5."

6. It is further agreed that the importers may at any time during the progress of the cause on original hearing or appeal present to any court before which the cause may come for its inspection and use and for the same purposes as if introduced as original exhibits, the following: Samples of Emperado Sherry Wine; samples of Burgundy Wine; samples of Claret Wine; samples of Budweiser Beer and any other beverage spoken of by witnesses. And also that the Government may for like purpose and with like effect present samples of sake.

19 The following by stipulation of counsel, or as evidence, etc., was presented to the circuit court:

Sake is the distinct name used in Japan and in the United States to designate a beverage fermented from rice and much used by Japanese. The sake, subject of this protest, contains 18% alcohol and is identical in character with the sake which was the subject of a decision of the United States Circuit Court of Appeals for the Southern District of New York in the case of United States v. Nishimiya, reported in 137 Fed. Rep., 396.

All the evidence introduced in the Hackfeld and Nishimiya cases hereinafter set out shall be evidence in this case with the same effect as if given orally in this case, subject to the objections specified therein.

Prior to 1894, sake was classified by the Collector at New York as distilled liquor.

In 1894, the protest of Y. Woozens claiming only that sake was dutiable at 50 cents per gallon as a still wine by similitude, was sustained and the classification changed by the Board of General Appraisers (T. D. 15392 G. A. 2786). This classification continued without protest until March 1902, when H. Hackfeld & Company of Honolulu, duly protested against such classification and claimed that sake was not properly dutiable as a still wine under paragraph 296 of the Tariff Act of 1897 as assessed, but was properly dutiable under paragraph 297 as ale, porter or beer at the rate of 40c. per gallon if in bottles or in jugs, or at 20c. per gallon if otherwise than in bottles or in jugs, or under section 6 at the rate of 20% ad valorem as a non-enumerated manufactured article, the said claims being severally and alternatively made under the paragraphs or sections referred to either directly or by similitude under section 7 of the said Act.

20

There are manufactories of sake in California which are sometimes salled sake breweries and they are required to pay the same tax as manufacturers of malt liquors, $50 per year and $1 per barrel on their product, being the same as the internal revenue tax on beer, ales and porter. They receive the same license from the Internal Revenue Department as beer brewers.

On the hearing of the protest of Hackfeld and Co. above mentioned before the General Appraisers, the only evidence offered by the importer was a joint affidavit by Adache and Miyamoto which is set out, post, page 30. The Government's only evidence was the report of the Government chemist, S. F. Ball, which is set out, post, page 36. The Board of General Appraisers in April 1903, overruled the Hackfeld protest (T. D. 24410 G. A. 5334) and a copy of the decision follows:

Opinion of Board on Hackfeld Protest.

Before the U. S. General Appraisers at New York, April 29, 1903.

In the Matter of the Protest 52972 *b*–388 *a* of H. HACKFELD & Co., Limited, against the Decision of the Collector of Customs at Honolulu, H. I., as to the Rate and Amount of Duties Chargeable on Certain Merchandise Imported per China, and Entered April 9, 1902.

Opinion of Waite, General Appraiser.

"The subject of this protest is a beverage in tubs or casks imported from Japan and known in that country as 'sake.' It was
21 assessed for duty at 50 cents per gallon under the following provision in paragraph 296 of the tariff act of 1897:

'296. Still wines, including ginger wine or ginger cordial and vermouth, in casks or packages other than bottles or jugs, if containing fourteen per centum or less of absolute alcohol, forty cents per gallon; if containing more than fourteen per centum of absolute alcohol, fifty cents per gallon.' * * *

"The protestants contend for a classification either under paragraph 297 or 298 at 20 cents per gallon, or under section 6 at 20 per cent ad valorem. Paragraphs 297 and 298 read as follows:

'297. Ale, porter and beer, in bottles or jugs, forty cents per gallon, but no separate or additional duty shall be assessed on the bottles or jugs; otherwise than in bottles or jugs, twenty cents per gallon.

'298. Malt extract, fluid, in casks, twenty cents per gallon; in bottles or jugs, forty cents per gallon; sold or condensed, forty per centum ad valorem.'

"The name 'sake' does not enlighten us very much or assist us in this decision, because it seems to be a term applied in that country to alcoholic beverages, regardless of the amount of alcohol, the component material from which it is made, or whether it is a distilled or fermented liquor. The Century Dictionary defines 'sake' as follows:

'1. A Japanese fermented liquor made from rice. It contains from 11 to 17 per cent. of alcohol, and is heated before being drunk.

'2. The generic name in Japan for all kinds of spirituous liquors, whether made from grain or grapes, fermented or distilled.'

"An investigation as to the manner of manufacturing the particular 'sake' in question here reveals the fact that it is pro-
22 duced in a manner similar to that employed in producing beer in this country, rice being used in place of barley. The analysis furnished by the Government chemist reveals the fact that it contains 17 per cent. of alcohol, 2.78 per cent. of extract, and a small amount of ash. A beverage thus constituted and thus produced is not specifically provided for in the tariff act. As stated above, it is similar to wine in its percentages of alcohol, extract, and ash, and in its use.

"Not being specifically provided for, we are forced to the conclusion that it should be classed either as a non-enumerated manufactured article, under section 6, or as still wine by similitude, under said paragraph 296 and section 7. As an article cannot be classed as non-enumerated if it can be brought within the terms of section 7, known as the similitude clause, we think this commodity should be held to be so far similar to still wine as to be classed as wine by similitude. It is similar in the amount of alcohol and other constituent elements; also in quality, general appearance, and somewhat in taste. It is not effervescent like beer, resembling in this respect also *still* wine. We are satisfied that it should not be classed as beer because of the high percentage of alcohol, and for the other reasons mentioned.

"We are convinced that the article is not the malt extract of commerce, which we believe to be the only commodity provided for in paragraph 298.

"The protest is overruled and the collector's decision is affirmed."

No appeal was taken by Hackfeld & Company, whose Counsel elected instead to submit a protest by W. Nishimiya, lodged at New York, which related to the same article and made the same claims The only evidence before the Board of Appraisers in the latter case was the record in the Hackfeld case. The general ap-
23 praisers following their former opinion, overruled the protest by an unpublished decision dated November 14, 1903, which follows.

Opinion of Board on Nishimiya Protest.

Before the U. S. General Appraisers at New York, Nov. 14, 1903.

In the Matter of the Protest 17,985-H—7843 of W. NISHIMIYA against the Decision of the Collector of Customs at New York as to the Rate and Amount of Duties Chargeable on Certain Merchandise Imported per "Coastwise" and Entered Dec. 26, 1902.

Opinion by Waite, G. A.

"The importers restrict their claims in this case to the first two items on invoice 22,401, designated as an 'N' within a diamond 1, 1 C'k 15 Gal. Sake and an 'N' within a diamond 2, 1 C'k 15 Gal. Sake.

"According to the statement of facts agreed upon between counsel for the Government and the importer, the merchandise consists of the Japanese beverage known as 'Sake,' and is identical in character with that subject of Board decision in re Hackfeld & Co., G. A. 5334, T. D. 24,410. The evidence in that case was somewhat voluminous, consisting chiefly of descriptions of the processes by which sake is made, in the form of affidavits, clippings from trade publications, etc. The Board deems it necessary to make part of the record in this case only the following exhibits: The agreed statement of facts; Exhibit B in the Hackfeld case, consisting of an affidavit descriptive of the process of manufacturing sake; a report embodying an analysis of the official sample in that case made in the Government Laboratory at the Port of New York, and the samples in evidence in that case.

"The merchandise was assessed for duty at 50 cents per
24 gallon, under the following provision in Paragraph 296 of the Tariff Act of 1897.

'296. Still wines, including ginger wine or ginger cordial and vermouth, in casks or packages other than bottles or jugs, if containing fourteen per centum or less of absolute alcohol, forty cents per gallon; if containing more than fourteen per centum of absolute alcohol, fifty cents per gallon.' * * *."

"It is claimed to be dutiable at 20 cents per gallon under Paragraph 297 or 298, or under Section 6, at 20 per cent. ad valorem.

"Paragraphs 297 and 298 read as follows:

'297. Ale, porter, and beer, in bottles or jugs, forty cents per gallon, but no separate or additional duty shall be assessed on the bottles or jugs; otherwise than in bottles or jugs, twenty cents per gallon.

'298. Malt extract, fluid, in casks, twenty cents per gallon; in bottles or jugs forty cents per gallon; solid or condensed, forty per centum *ad valorem.*'

"In the Hackfeld case (supra) the Board found that sake was a beverage made from rice by processes similar to those employed in making beer, but that in alcoholic strength (which was about 17 per

cent.), quality, general appearance, somewhat in taste, and other physical characteristics, it resembled wine. It accordingly held the article to be dutiable by similitude at the rate imposed upon "still wines" by Paragraph 296, and not dutiable, either directly or by similitude, as beer or as malt extract, under Paragraph 297 or 298, or at 20 per cent. *ad valorem* as a non-enumerated manufactured article under Section 6.

"Following that decision the protest is overruled and the Collector's decision is affirmed."

The importer appealed to the United States Circuit Court for the Southern District of New York, where he introduced as additional evidence only the testimony of Dr. Endemann and Mr. Farrington, set out, post, pages 36-42. No additional evidence was introduced by the Government. The Court reversed the decision of the Board of Appraisers and held sake dutiable at 20% *ad valorem* as a non-enumerated manufactured article under section 6 (131 Fed. Rep. 650). The opinion follows:

25

U. S. Circuit Court, Southern District of New York, May 25, 1904.
Suit 3451.

NISHIMIYA
v.
UNITED STATES.

Application to Review a Decision of the Board of General Appraisers.

TOWNSEND, *Circuit Judge:*

"The merchandise in question is sake, imported from Japan. The Board of Appraisers finds that it is a beverage made from rice by processes similar to those employed in making beer, but which in alcoholic strength, quality, general appearance, and otherwise resembles still wine, and therefore held it to be dutiable at 50 cents per gallon, by similitude to still wines, containing more than 14 per cent of absolute alcohol, under the provisions of paragraph 296 of the tariff act of 1897.

"The importer protests on the ground that the beverage is dutiable either as ale or beer, under the provisions of paragraph 297 of said act, either directly or by similitude, or as a non-enumerated manufactured article under section 6 of said act.

"This beverage is neither ale, beer, nor still wine. It is similar to ale or beer in that the material from which it is made is rice, and in the fact that it is, like beer or ale, fermented with yeast. It is more like wine than beer in its quality, as the percentage of alcohol contained in it is about 17 per cent, while the percentage of alcohol in beer ranges between 3½ and 9 per cent, and in wine between 7½ and 16 per cent. A test of the sample by taste and smell and examination indicates that it is only remotely similar in quality to either wine or beer. In use it is like either liquid, being drank for flavor and exhilaration; it is unlike them in

26

that it is ordinarily drank hot. In quality it is more like wine in the sense that it is still as distinguished from the ordinary effervescent ale or beer.

"In these circumstances, sake is not sufficiently similar to still wine to warrant its assessment for duty under paragraph 296 of the act; and because of the high percentage of alcohol therein, the absence of effervescence, and its quality, taste, and use, as aforesaid, it does not seem to be sufficiently like beer or ale to permit of its inclusion under paragraph 297. The conclusion reached is that it is so radically different from the article covered by both of said paragraphs that it should have been classified for duty as a non-enumerated manufactured article under section 6 of said act.

"The decision of the Board of Appraisers is reversed."

The government appealed to the United States Circuit Court of Appeals which affirmed the decision of the lower Court. (137 Fed. Rep. 396.) The opinion of the Court follows:

(T. D. 26155.)

U. S. Circuit Court of Appeals, Second Circuit, March 3, 1905. No. 138 (Suit 3451).

UNITED STATES
v.
NISHIMIYA.

Appeal from the Circuit Court of the United States for the Southern District of New York.

Before Wallace, Lacombe, and Coxe, Circuit Judges.

27 This is an appeal from a decision of the circuit court for the southern district of New York which reversed the decision of the Board of General Appraisers, which had affirmed the decision of the collector in the classification and assessment of duty on a certain fermented liquor known as "sake," imported from Japan. The decision of the circuit court is reported in 131 Federal Reporter, 650 (T. D. 25386).

COXE, *Circuit Judge:*

"Sake is not specifically enumerated in the tariff act of 1897. The collector assessed it by similitude to 'still wines' under paragraph 296 of the act, which is as follows:

" '296. Still wines, including ginger wine or ginger cordial and vermuth, in casks or packages other than bottles or jugs, if containing fourteen per centum or less of absolute alcohol, forty cents per gallon; if containing more than fourteen per centum of absolute alcohol, fifty cents per gallons.' * * *

"The importer filed an alternative protest, insisting that the merchandise should be assessed by similitude to 'beer,' or 'malt extract

fluid,' under paragraphs 297 and 298, respectively, or, if not so dutiable, then as an unenumerated manufactured article under section 6 of the act.

"Paragraphs 297 and 298 are as follows:

"'*297*. Ale, porter, and beer, in bottles or jugs, forty cents per gallon, but no separate or additional duty shall be assessed on the bottles or jugs; otherwise than in the bottles or jugs, twenty cents per gallon.

"'*298*. Malt extract, fluid, in casks, twenty cents per gallon; in bottles or jugs, forty cents per gallon; solid or condensed, forty per centum ad valorem.'

"Finding the merchandise unenumerated it was the duty
28 of the collector to examine the law to ascertain if it resembled any enumerated article sufficiently to warrant the application of the similitude clause; if it did not, the general catch-all clause would have received it as a nonenumerated manufactured article (Hahn v. United States, 40 C. C. A., 622; 100 Fed. Rep., 635).

"The similitude clause (sec. 7) of the act, in so far as applicable, is as follows:

"'That each and every imported article, not enumerated in this Act, which is similar, either in material, quality, texture, or the use to which it may be applied, to any article enumerated in this Act as chargeable with duty, shall pay the same rate of duty which is levied on the enumerated article which it most resembles in any of the particulars before mentioned.' * * *

"Sake is a beverage, a product of the fermentation of rice, produced by a process similar to that employed in making beer in this country, rice being used instead of barley. An analysis of a sample of the importation in question shows it to contain 17 per cent of alcohol, 3.874 per cent of solids, and .064 per cent of ash; the remaining 78.5 per cent being water.

"Polariscopic and other tests disclosed the presence of maltose, which is the first product of the change of starch under the action of diastatic ferments, and indicates that the fluid was the product of a starch-bearing substance.

"Sake is amber colored, has a sweet taste, has no head, and is always heated before being drunk.

"Still wines are produced from the natural saccharine juice of fruits and do not contain starch or maltose which is a product of starch. They are always fermented in closed casks in the absence of air and contain from 7½ to 16 per cent. of alcohol.

"Beer is brewed by a process similar to that which produces
29 sake; it is usually effervescent, is cold when drunk, and it contains from 3½ to 9 per cent. of alcohol.

"The name 'sake' is apparently arbitrary and not descriptive, and conveys little or no intelligence to the mind. The record, too, is very meager as to the points of similarity between it and the other beverages with which it is compared; many of the characteristics of wine and beer being untouched by the proof.

"Taking the criteria of section 7 above quoted, we find sake to be

similar to beer in material and the use to which it is applied and similar to still wines in quality and use. A comparison in 'texture' would seem to be inapplicable to liquids.

"Sake resembles beer in its process of manufacture and in the presence of maltose in the extract, which is a characteristic of beer, but is never found in still wines. It resembles still wines in the large percentage of alcohol, and it has many points of similarity to both wines and beer. It is also true that in many particulars it is wholly unlike anything mentioned in Schedule H of the tariff act.

"The similarity to still wines, based upon the large amount of alcohol found in the imported merchandise, presents the strongest reason in justification of the collector's classification. In other respects we incline to the opinion that the importer presents the stronger argument. Taking everything into consideration there are certainly as many points of resemblance between sake and beer as between sake and still wines. If there were no alternative but to select one or the other of these similitudes, it is probable that the decision would be in favor of the appellee under the rule that resolves a doubtful question of tariff interpretation in favor of the importer.

But sake has so many characteristics which are not found in either beer or wine, its ingredients are so unusal and the process of its manufacture so unique, that it may be fairly held that it is nowhere described, except by the general language of section 6.

"The decision of the Circuit Court is affirmed."

Komada & Co. introduced the evidence following:

Record in Hackfeld and Nishimya Cases.

Testimony Before the Board.

A. Adachi and H. Miyamoto, (first presented in Hackfeld case), by affidavit dated Honolulu, Nov. 18, 1902, each for himself states that he has been an assistant brewer of "Sake" in Japan, that he is familiar both from observation and personal knowledge with the manufacture of "Sake"; and that the annexed translated statement of the processes used in its manufacture is true and correct.

Process of Brewing Sake.

Rice used for brewing Sake must be best in its quality, so well polished that the uncleaned Rice is reduced in quantity 25 per cent. or more; it must also be thoroughly washed out three different times, passing nearly 150 times in fresh water and until the water is free from "Rice Water." Then it is placed in a tub overnight before being steamed (cooked by steaming).

Water used for brewing Sake is drawn from a well and put into a tank for over two days, allowing it to settle free from any sediment. The water in this refined state is also used for washing the Rice and for other purposes in the process of manufacture of Sake.

31 Malt (Moyashi).

The Malt is an essential substance in making the yeast as used in the process of brewing Sake. It is made as follows: The steamed cooked Rice is taken into a room (a hot-house or conservatory) mixed with a very small quantity of the original malt and charcoal of the marble tree, and is spread over flour so as to avoid sticking or adhering together of the grains, and is then wrapped up in a thick straw mat. When warmed to a certain degree of temperature, it is then taken out and placed into boxes (called malt boxes), and these boxes are arranged on shelves provided in the conservatory. During all this time the boxes are covered with the mat so as to keep them warm, thus forcing the contents of the boxes to become mouldy. When in this mouldy condition it is taken out and flatly arranged over the surfaces of the bottoms of the boxes. These boxes are then wrapped up again with the mat until their contents become more mouldy and each grain of the Rice begins to form the colors of blue and yellow, and adherers to the bottom of the boxes. In this condition the boxes are left over for one day and then rearranged on the shelves in the store room for seven days, further forcing contents to become more mouldy until it becomes the Malt. In order to preserve this Malt it is necessary to keep it in a place having fee ventilation of air.

Yeast.

The steamed cooked Rice, when cooled to a temperature of eighty degrees, is mixed with a little quantity of the Malt (one half of the malt box), then covered with a thick straw mat, and after two hours have elapsed is rubbed off to avoid each grain of rice sticking
32 or adhering to another; then another quantity of the Malt (one half of the malt box) is added to it and the same is covered with the mat again. In this way the temperature of the Rice will gradually rise, the Rice itself beginning to form a milky color, in which condition it is replaced in the boxes. Then after four or five hours the Rice is stirred and mixed by hand, which is repeated after another five hours, covering with the mat. It then becomes more milky-white in its color, thus becoming Yeast.

Shubu or Primary State of Sake.

1st day, at 4 P. M., 21 gallons of the steam-cooked Rice well cooled, is equally divided and put into eight large tubs (having a capacity of about 15 gallons each), then mixed with about 10 gallons of Yeast and also with 25 gallons of water. The mixed contents of the tubs are to be well and thoroughly stirred up with a stick as well as with hands, once every two hours.

2nd day, at 6 A. M., the contents of the tubs are crushed with sticks in a manner by stirring for about one hour or so, and at 1 P. M., the same process is repeated. During all this time the stirring must be regularly attended to every two hours.

3rd day, at 5 P. M., the contents of eight tubs are transferred into four tubs, the stirring being regularly attended to every two hours.

4th day, at 4 A. M., the contents of the four tubs are again transferred into one large tub; the stirring being regularly attended to.

5th day, at 4 A. M., a keg containing hot water (called a hot keg) is thrown into the large tub and so arranged with several
33 sticks as to keep it constantly submerged. At 1 P. M., another hot keg is put into the large tub, replacing the one which was put in in the morning. By this time the contents of the large tub is in a state of fermentation.

6th day, at 3 A. M., the hot keg is taken out and again replaced by another, this being repeated at noon time. At 11 P. M., the hot keg is taken out.

7th day, at 4 A. M., another hot keg is again thrown into the large tub. At this time, the contents of the large tub have become, to a certain extent, fermented, having two tastes, sweet and sour. In the afternoon the hot keg is again taken out and at this time the contents of the large tub has become quite fermented, sticky foams appearing on the surface of same. Another hot keg containing water heated to a temperature of about 100 degrees, is again thrown into the large tub, the same being constantly rolled around inside of the tub for 50 or 60 hours. The various tastes of the contents of the large tub, at this stage, consist of the following five mixtures, viz., sweet, sour, bitter, acrid, and astringent; the state of astringent being the component.

During the 8th and 9th days it is allowed to remain undisturbed.

10th day, at 4 A. M., the hot keg is again placed into the tub and same covered with the thick mat. This is repeated at 6 P. M., at which time it has become quite fermented.

11th day, at 4 A. M., the hot keg is taken out, and if the temperature of the contents be less than 90 degrees, it is then necessary to apply another hot keg; but if more, the contents is then
34 transferred into four tubs, which are to be cooled off for 5 or 6 hours. This is called "Shubu," or the primary state of Sake, and five days after this it undergoes another process called "Soyegake."

"Soyegake."

At 5 P. M. on the 5th day after the preceding process is finished, the contents of the four tubs of "Shubu" are put into a tub, which is stored in the conservatory and mixed with five gallons of Yeast and 55 gallons of water, and same stirred up several times. At midnight, another five gallons of Yeast is added to it and at 6 A. M. of the next day about 44 gallons of the steamed-cooked Rice, at a temperature of 80 or 90 degrees, is also mixed therewith. After 5 o'clock of the same day, the Rice and Yeast in the tub will be seen rising upon the surface. During all this time, and including the next day it is necessary that the contents of the tub be constantly stirred up in the same manner as heretofore mentioned.

"Nakagaki."

At 4 o'clock in the morning of the fifth day after the foregoing process is undergone, the contents of the tub is then transferred into

two tubs, with an addition of 24 gallons of Yeast and 100 gallons of Water, that is, 12 gallons of Yeast and 50 gallons of Water to each tub, and at 8 o'clock of the next morning, 75 gallons of Steamed-Cooked Rice, well cooled off (or 37½ gallons to each tub) is added therewith. During the process, the contents of two tubs are regularly stirred up once in every two hours. At 4 or 5 P. M., of the same day, the contents are in a state of fermentation, evidenced by rising of the Rice and Yeast above the Water.

35 "Tomegake."

At 1 P. M. of the next day after the preceding process is undergone, the contents of the tubs are again transferred into four tubs, with another addition of 75 gallons of Yeast (or 19 gallons to each tub) and of 144 gallons of Steamed Cooked Rice (or 38 gallons to each tub). The contents of each tub should be stirred up until fermented. After three days the contents of the four tubs are then transferred into one large tub, the contents should then be at a temperature of 67 degrees or more with abundance of a sticky foam, which will gradually disappear in the course of twenty or twenty-one days from the starting of this process. The contents of the tub is then strained through cloth, the residue of which is called the dreg of Sake, and the Sake is then put into another large tub, there to settle.

"Boiling or Heating."

When the Sake is settled free from its dreg, it is put into a large kettle (the inside of which is lacquered or japanned for the purpose of avoiding the solution of iron), and is carefully boiled or heated up to 135 or 140 degrees temperature; then it is transferred into a covered tub, full and tightly shut up, and then it is stored in a very dark room which is kept shut up.

After 50 or 60 days have elapsed a small quantity of Sake is then drawn from the tub through a mouth which is provided in the lower part of the tub, and sampled as to its taste. This must be carefully done, for if taste is once mistaken it will result in considerable damages.

36 The foregoing is the entire process of brewing Sake, which is composed of three distinct substances, viz: Steamed Cooked Rice, Yeast which is made from the Rice and Water, with no other substance whatever.

The boiling or heating is for the purpose of preserving the Sake.

Chemist's Report (First Introduced in Hackfeld Case).

U. S. LABORATORY, APPRAISER'S OFFICE,
NEW YORK, *April* 16, 1903.

Marks and numbers: Japanese Sake. No. 52,972-B.
No. 52,457-B.

Submitted by: Hon. Byron S. Waite, Acting Chairman Bd. Class'n, U. S. G. Appraisers.

Absolute alcohol, by volume, 17.00 per cent.

Extract, 2.78 per cent.

Ash, 0.04 per cent.

Taking into consideration the origin, method of manufacture and chemical composition conjointly, the sample is neither wine nor beer, but is in fact an alcoholic beverage which presents the physical characteristics of Sherry wine.

S. F. BALL, *Chemist.*

Approved:

W. WHITEHEAD, *Appraiser.*

Additional Testimony before Circuit Court, Nishimiya Case.

JOSEPH MCC. FARRINGTON (first introduced in Nishimiya case), Witness for importer, testified:

Direct examination:

I have been Examiner of wines and liquors at the Port of New York since 1867 continuously to the present time (1904). I
37 officially examine beer, ale and similar substances as well as wines and liquors in the stricter sense and have done so ever since 1867. In the course of my official employment I have examined sake. It is a distinct name for a Japanese article of the character of a beverage.

HERMAN ENDEMANN, witness for importers, testified (first introduced in Nishimiya case):

Direct examination:

I am a chemist by profession and graduated in chemistry in the year 1864. I have since then been practicing chemistry as a profession without interruption. (The attorney for the Government conceded the competency of the witness.)

This bottle labelled "sake" contains the remnant of a bottle a portion of which was taken out by me for examination. I examined it in the first place for alcohol. It contained about seventeen per cent of alcohol. Then I examined the alcohol to see what it was composed of, and I found therein some free acid, some acid esters, and also a small quantity of aldehyde. The solids were then determined, and were found to be 3.784 per cent. Extracts and solids are the same thing; some call it extracts and some call it solids. By evaporating 100 parts of sake, and incinerating the residue I obtained .064 of one per cent as ash, the ash being the unconsumed remnant.

Sake is evidently a product of the fermentation of rice. I further examined the ash and I found it contained considerable iron and also phosphate, the quantity not being determined. The fact that
38 the ash contained some iron and some phosphates is not helpful in determining the character or derivation of the product.

The facts which I elicited were not helpful as regards the origin of sake from rice, but simply helped as far as derivation is concerned to show it was from a starch-bearing product, and that the alcohol which has been found is a product of starch by first converting it. I find that sake contains maltose, which is the first product of the change of starch under the action of diastatic ferments. I am professionally familiar with the manufacture and chemistry of beers and ales. I have made for a number of years in my laboratory examinations of the beers of the United Brewers of Baltimore, wherein the examination of the beers, the wort and the young beer were of weekly occurrence. I am similarly familiar in a professional way with the chemistry and manufacture of wines—still wines only. The presence of maltose in the sake, and the fact that it is the product of the change of starch under the action of diastatic ferments are facts that are characteristic of beers and ales. Still wines never contain maltose, because wines are produced from saccharine juice and do not contain any starch, and consequently there cannot be any maltose present, because maltose is only a product obtained from starch. By saccharine juices I mean the natural saccharine juice of fruits.

Of the acids which are present in the solids of sake only succinic and lactic acids were identified by me. The malic and tartaric acid, which are always ingredients of wines produced from saccharine fruit juice, were completely absent in sake.

The conclusion chemically derivable with certainty from
39 the presence of the lactic and succinic acid found in sake is that it is a fermented product. In fermentation, no matter what sugar does ferment, succinic or lactic acid are always present, the latter however, only in beer, for the reason that the lactic acid is mostly formed in open fermentation. That means exposed to air while the fermenting process goes on. In still wine there is always contained succinic acid, but it does not contain lactic acid. The succinic acid product simply shows that an alcoholic fermentation has taken place. The lactic acid shows that the alcoholic fermentation is an open fermentation whereby lactic acid forms and is therefore present in beers and ales. It is a characteristic of the manufacture of beers and ales.

Wines are always fermented in the absence of air in closed casks from which the air is carefully excluded. The carbonic acid gas which develops during the fermentation of grape juice, for instance, is allowed to pass out of the cask; but there is always provision made that the outer air cannot enter the cask by inserting a tube into the bung-hole of a cask, and letting the end of this tube dip into water.

The quantity of nitrogenous substances, which are generally called peptones, is over one half per cent in this sake. This nitrogenous substance was in what I denominated solids, in the 3.874 per cent. When I say that it was over one half per cent I reckoned upon the entire substance of the sake. This is determinative as showing that sake is the product of a starch-bearing substance. The fruits and fruit juices contain likewise a small quantity of peptones, but only
a very much less quantity. The highest limit is .29 of the
40 entire substance of the wine: but as a general thing it is less than one tenth of a per cent.

Beers and ales vary through a very wide range with respect to degree of effervescence. In former years the amount of carbonic acid found in beer was evidently not so regular and not so common. I found in a Hand-book of Applied Chemistry, by J. Dumas, (published originally in Paris, but this translation was published in Naumberg in 1844), that there were quantities of beers in the market which contained so little carbonic acid that you could pour them out the same as water without forming any beads on the side of a glass, and in order to obtain a test in regard to that the author has investigated the amount of carbonic acid which is present in beers which are absolutely still and those that are relatively still. The book is recognized still among chemists as a trustworthy authority for the facts that it gives.

Beers and ales have varied in very wide limits in regard to percentages of alcoholic strength. Wines vary considerably in this respect. Some wines contain over five and one-half times as much alcohol as other wines; and in the case of beers and ales the alcoholic strength varies in the proportion of about five or six times the quantity which is contained in the weakest beers. I have drunk both beer and ale. They are drunk at all temperatures up to a point at which people can consume drinks without scorching or burning their mouths.

Wine directly placed in the sacch-rometer has only a minimum action when it is observed through a sacch-rometer. Sake
41 similarly observed shows 10.3 degrees of dextro rotation in the sacch-rometer, the tube of observation in both cases being 200 millimeters in length. This fact is determinative of the presence of dextro-rotary substances which are present in liquids obtained by the fermentation of starch-bearing substances. The still beers and ales contain but a very small quantity of carbonic acid, while those which are highly effervescent contain a very large quantity of carbonic acid dissolved. Very high percentages of carbonic acid gas in these beverages indicate generally an artificial charging with carbonic acid gas. The higher the temperature the less carbonic acid gas will remain. A slow process with much exposure will tend to leave but very little carbonic acid gas in the beer.

I could not tell from the analysis whether sugar is employed in the fermentation of sake. Saccharine fruit juice is a different thing.

The "Process of Brewing Sake" described in the Adachi and Miyamoto affidavit would produce such a compound as I have analyzed. It would be a beer. I have examined wines which contained 7½ per cent, and wines which contained 16 per cent of alcohol; beers from 3½ to 9 per cent.

Cross-examination:

The remaining percentage after deducting the alcohol, solid and ash, is the percentage of water in the entire bulk which I analyzed.

I made a polariscopic test with my own instrument, standardized I think at 20 degrees Centigrade. I filled the observation tube completely with it. I have not made a polariscopic test lately of any

still wines. I have read a good deal about those things but
42 have made no real polarimetric test of still wines recently.

The rotation in sake is due to maltose which is dextrorotatory. The rotation of still wine can be nothing, unless it is adulterated with starch sugar, as such still wines have no rotary power. It may turn on the left or it may turn slightly to the right, but only very minutely. I attribute the rotation in the sake to the presence of maltose. Maltose is a derivative of malt; it is obtained from the starch by the action of diastase. From the polarization of sake I found that there is a certain quantity of maltose, and from the reducing power of the extract and the extract after it had been treated with an acid and neutralized, I concluded that there was a certain quantity of maltose present, because maltose must be looked upon as a chemical compound. I found maltose by the polariscopic test and by the reducing test. There is never any maltose in still wines. The difference in the rotation is owing entirely to the presence of maltose. The aldehyde is a volatile substance. I find aldehyde in the sake. The presence of aldehyde is more characteristic of beers and ales than of wines.

(The for-going was all the evidence before the Board and Court in the Nishimiya Case.)

Importers' Evidence Taken Before the Board in Komada Case.

CORBET ALFRED PEACOCK, witness for importers, testified:

Direct examination:

I am a saloon man at present. I was formerly in wholesale liquors in Honolulu, about ten years.

43 I have dealt in sake. I was in the sake business eight years from 1890 to 1896 until I left Honolulu. I haven't been in it recently. The name of my firm is W. C. Peacock & Co.

Mr. Jackson makes the offer to prove by Mr. Peacock what sake was known as during the time he was in business in Honolulu and also during the time he was in business in the United States, and what it was known as in the trade and commerce and commercially.

Offer rejected.

CHARLES E. WETMORE, witness for the importers, testified:

Direct examination:

My home is in Stockton and my business in San Francisco. I am connected with the wine industry and am now employed by the California Consolidated Vineyard Co. I have had experience for about 35 years in the manufacture, sale, and handling of wines. The letters from Col. Irish, Naval Officer, and R. M. Wood, were addressed to me, and read as follows:

OFFICE OF THE NAVAL OFFICER OF CUSTOMS,
PORT OF SAN FRANCISCO, *Apr'l 8th*, 1904.

Mr. Charles A. Wetmore has had the most important relation to the development of our vintage of any man in California. The wines

of this state never attained a high type until he used his Cresta Blanca vineyard as a chemist does his laboratory. His study of fermentations, of methods for eliminating the alcohol which the surplus sugar in our grape produces, resulted in removing that "heady" quality which has been the reproach of our wines.

It is saying only the truth that our whole modern and successful wine production in this state is the result of his skill, knowledge and sacrifice. What he learned in his investigations, though it cost him dearly, was given up to become a part of the common stock of knowledge of the vintners of the state. His ability as a wine expert is derived from his knowledge of agricultural chemistry and of the relation of soils to the finished product, and of all the processes from the must to the bottle by which our wines go from the vines to the consumer. I have known him and his work for twenty years, and have often said that if France or Germany had been his field, governments would have honored him by the bestowal of decorations and pensions. Wherever his skill and knowledge may be employed, one thing is sure, they will be devoted alike to the interests of the producer and the consumer of our wines.

JOHN P. IRISH,
Naval Officer.

PACIFIC WINE AND SPIRIT REVIEW,
JOURNAL OF VITICULTURE,
SAN FRANCISCO, *Ap'l* 8, 1904.

To whom it may concern: It has been my good fortune to know Charles A. Wetmore during the past 20 years. I am intimately acquainted with his career as a vine grower and wine maker, and like all who are familiar with the history of viticulture in this state, I consider that he is entitled to the title of a father of the industry. To his abilities, experience, and boundless energy the fame that the highest class of California wines have attained is very largely due. His knowledge is not only practical but scientific, and I feel justified in saying that he has no superior in the United States in the making, maturing and blending of high class wines.

R. M. WOOD,
Publisher and Editor.

Wine is a fermented product of the juice of fruits, generally applied to the juice of grapes, but frequently applied to the juice of other fruit. In its manufacture the juices are subjected to the ordinary processes, to the yeasts found naturally upon the fruits when gathered, the product of the fruit being crushed and pressed, and thereby mixing the natural yeast with the juices, whereby they go into the process of fermentation, the result of which in the end is wine. These are modified in practice; sometimes yeasts are prepared and introduced, but that is the fundamental principle. There are great variations in the methods of applying the principles.

The wine ordinarily spoken of from grape juice contains a natural fruit acid both free and combined with alkalies, the principal ones being tartaric and malic acid associated with more or less phosphoric

and others. These are naturally in the fruits. But in the finished wine there are acids that are the product of fermentation, which vary according to whether the wine was well fermented or not. If well fermented it is limited to a few prominent, among which is succinic acid, acetic acid, or some lactic acid, on account of the imperfection of the yeast, which in ordinary wine making is natural wild yeast.

Wild yeast is the yeast found in nature or the plant itself at the time the fruit is crushed. Cultivated yeast may be selected so as to eliminate other imperfections, but in natural yeast there is more or less imperfection. In the process of fermentation by the yeast the sugar is converted into approximately one half carbonic acid gas, and one half alcohol. The carbonic acid gas causes the tur-
46 bulence known as fermentation, and more or less escapes or is retained at the will of the manufacturer. In still wines carbonic acid gas is not generated. It is supposed to be in all wines except those especially effervescent, where it is entirely eliminated and allowed to escape. The gas is allowed to escape into the air through tubes or open tanks or otherwise, red wines being generally made in an open tank, white wines generally puncheons or in tanks which are sometimes covered and hermetically sealed. But after the wine is made it is kept in casks or barrels, with a loose bung, leaving the gas a chance to escape.

The amount of alcohol developed in the fermentation in the manufacture of still wines varies with the amount of sugar that is in the grape must, at the time the grapes are pressed, and upon the successful operation of the fermentation. If it is complete all the sugar is converted into carbonic acid gas and alcohol. If it is incomplete, checked by accident or otherwise, the proportion of sugar to the amount of alcohol is in proportion to the amount of sugar fermented out. If absolutely good the wine is dry, in which case if the grapes have 25 per cent. of sugar you will have about 13 to 14 per cent. of alcohol, a little more than one half alcohol. I have myself developed as high as 17. It is not usual with the trade because not desired.

Sherry material is a name known only to the large dealers in the trade. It is not known to the public, it is not a proper expression. It is simply material they purchase from growers to be afterward heated and developed into an imitation of sherry. It is not sherry or sherry material. It is an imitation. It is simply white wine or any
47 old thing with alcohol added. It is and it is not wine. It is wine fortified with grape juice. Sherry material has no particular taste not possessed by other wines, except that some of the sherry material here used tastes of rotten grapes and bad management, and some of the sherry material is very disgusting, and some of it is very fine. No sherry is made from sherry material, it is an imitation. Malaga, Madeira, and all the entire line of sweet wines are made from sherry material by the addition of sugar, syrup or port. It is used very largely in giving age to port.

In order to be a wine expert one must necessarily make a study of all matters connected with alcoholic fermentation. I am a student of and have become familiar with the manufacture of beer. Beer is an

alcoholic fermentation of an infusion with water of farinaceous substances; the farinaceous substances may be potatoes, corn, rye, oats, wheat, barley, rice, or any other of those products. The process is in general to mash the material, modified by local custom, boil it, mix it with a certain amount of material which has been malted or otherwise contains a diastase, the effect of which is to convert the starch into sugar and then to pitch it with a yeast which is of the same family, but a little different from the yeast that makes wine, saccharomyces cerevisiae. In the manufacture of beer fermented from grain the first step is the conversion of starch into sugar. The second is the alcoholic fermentation by means of the yeast.

In the case of wine there is no starch and the alcoholic fermen-
48 tation proceeds from sugar in the fruit juice directly, whereas in the case of barley the fermentation is made by converting starch into sugar. Carbonic acid gas is produced in the manufacture of beer the same as in wine. There is no difference in the conversion of the sugar into alcohol and carbonic acid gas. In the manufacture of beers generally it is desired that carbonic acid gas escape entirely as in the case of wines.

The proper beer for consumption is always absolutely still, and those who are connois-eurs in beer would drink nothing with carbonic acid gas in it, but the trade custom produces a taste for carbonic acid gas in beer and a great many manufacturers decide to obtain it, some illicitly. But a good beer is absolutely dry and as clean as a wine. As a rule beers are generally called ales when absolutely still and sold on draft, and connois-eurs would value the beer in proportion as it shows age and completion, as with lager. A genuine lager beer is two or three years old in the cask. The common commercial lager beer simply has the name that don't apply to it. Lager means laid away and aged like wine.

The acids of beer differ from those of wine in that there are no fruit acids. Then there is no tartaric acid, malic acid. The acids in beer are all a product of fermentation and are not found in the germs. There is more or less sulphuric acid in the product, but during the process of fermentation the beer yeast is made for the purpose of developing the lactic acid in order to destroy the bacteria, of which the lactic acid is an antiseptic, so consequently if the beer yeast has been made and soured it will introduce into the beer promi-
49 nently lactic acid and more or less butyric, but the main acid to be found in beer is lactic acid together with some of the other complex acids.

Maltose is a sugar developed during the malting and that is more or less eliminated in the process of fermentation, but it is the aim in making beer to contain it. There is no maltose in wine. Brandy can be distilled from wine. From beer the various forms commonly known as whiskey can be distilled. Whiskey cannot be made from wine nor brandy from beer.

The Sake sample (Exhibit 2) in appearance is of light color that might be water, alcohol, white wine or light colored beer. It might be cologne water. It might be sake. In smell it resembles beer. It has the odor of beer yeast. It has a very light acid taste; it seems

to be lactic acid, possibly not more than 2 per mille. The flavor is a compound and is modified by several materials. It tastes strongly of beer yeast,—a cammomile flavor such as is in beer yeast or compound yeast in the market. There is a little flavor such as is suggested by malt. There are several flavors there. There is an acid beer yeast taste and that is associated with more or less alcohol such as is found in all grain distillations or in the products that are distilled for making whiskey.

Whiskey can be made from either finished or unfinished beer. It is generally made from new beer. All whiskey is made from beer whether it is made from barley, as is barley whiskey, malt whiskey, Kentucky whiskey or rye, and in China Samchu, which is a distillation of rice beer; the products that are distilled in whiskey are all called beers in Kentucky and elsewhere.

50 This sake has no impression to me of being distilled. I do not taste any indication of a distilled liquor in it. It is generally prominent because of being pungent to the palate.

A spirituous beverage is one in which the distilled essence of any material called a spirit, whether alcohol, ammonia or otherwise, is mixed with something else so the spirits part of it is apparent above the mixture in which it is contained.

A spirituous beverage is one whch contains more or less of a distilled product known as a spirit. It is not known as a spirit until it is distilled.

Fermented drinks contain spirits only when distilled. The spirit of anything is the distillation of it. A spirituous beverage is never made except by the addition of distilled liquor. Porters and ales are made by the same process as beers.

This is a sample of ordinary beer yeast, compressed yeast sold in the market here for family purposes; it is gathered on top of beer for making bread or otherwise. Compared with sake there is the same smell exactly to the two, only one is raw and the other combined with alcohol. Wild yeast is a term that I do not admit to the extent that scientists do. I have succeeded in making all my wine with common wild yeast, what they say is wild yeast, which I find on the grapes without any preparation. All wines made in this state are made with wild yeast. In some champagne manufactures it is necessary to have a selected yeast, as otherwise the sediments would not drop. In wine making they use the common wild yeast, but you can use the selected yeast.

51 With respect to the water used in the manufacture of sake, they find in Japan, according to the reports of the experts, the same as they find for beers. They claim certain properties for certain waters, which make a better or poorer quality of beer because of the mineral it contains. In wine we find them in the grape juice; sometimes acid or cream of tartar are added to help the ferments, but in the case of the rice the fermentation of these germs, or the development of them is not perfected without more or less of these minerals, which are said to be found in certain wells and can be added artificially like potash.

Cross-examination:

I have investigated beer to the extent that I have studied all the books and experts and have gained all the knowledge I could on the subject. I have seen it made frequently, the principle is the same in all cases. I know the process. I have studied chemistry to the extent of studying it in college and continuous study since. I have taken a degree as Master of Arts. I had to study chemistry to get a degree. The course is about a year, but I have studied ever since. I have not been required to do so myself, but have had under me men who had to analyze beer. My knowledge of beer comes not only from reading, but from observation and seeing the work done. I have had occasion to examine the ferments in beers under a microscope.

A spirituous beverage is one which contains more or less of a distilled product known as a spirit, which is not known as a spirit until it is distilled. There is no such thing as a spirit not distilled; it is only a spirit when separated, it is the spirit of the article.

52 It is a spirit only when distilled. So far as I know there are no genuine spirits manufactured except by distillation. I would consider a sweet muscat containing 16% of alcohol to which spirits have been added a spirituous beverage. I would not consider a dry muscat to which spirits have not been added but which tested 17% to be a spirituous beverage, but it is not natural wine. So I might consider a dry wine to which alcohol had not been added as a non-spirituous beverage even though it may exceed in alcoholic strength a sweet wine to which alcohol has been added. Sweet muscat to which spirits have been added and the alcohol strength of which is 16 per cent would be considered a spirituous beverage, but it is not properly called. Chemically and technically I would call a sweet muscat, containing 16 per cent. of alcohol and fortified, a spirituous beverage. I would call it so under my definition. The flavor of wines is a compound flavor. In that respect I find Sake absolutely different; there is no resemblance in sake to anything in wine.

I did not find any flavor of hops when I tasted sake. A genuine beer will not foam, it is not complete and aged and fit to drink if it foams. If properly aged the gases all escape as in wine. The beers that foam are not fit to drink, generally new stuff, not wholesome and never drank by people who know their own stomachs.

Wine is the fermented juice of grapes. I think it is mostly wild yeast in sake. It is all wild yeast in wines except where some of our scientists get selected yeast; but it is the practice of ninety-nine out of a hundred to make it out of wild yeast.

53 Beer yeast is the common yeast developed in the wild state from germs that exist on the husks of the various grains that are used, whether wheat, corn, oats, barley when moistened and given warmth, developing into yeast more or less impure. Scientists and experts develop them into purity by killing off more or less wild material until they have what they call selected yeast. The process of drying yeast is this: in the natural state it contains a great many impurities. Besides the saccharomyces which produce alcohol from

sugar, there will be no other ferments or fungi growths and bacteria. The lactic ferments develop more or less lactic acid, and this destroys the germs, otherwise they would injure the beer. I have never seen sake made. I have never seen the yeast used in sake. My opinion as to whether it is the wild yeast or not is only by reading and from instruction from those who ought to know, not from my own knowledge. They select a yeast but it is not proper. So far as I know from my knowledge of sake and its manufacture the yeast could not be wild and the production be the result we have here. It would be possible to produce this result with the wild yeast if you get the wild yeast. The diastase is produced by a mould called aspergillus; there are others that produce similar diastase. If the yeast produced from sake could be produced from rice with nothing added, I would say that was the wild yeast. I don't know whether the yeast is wild or cultivated.

Diastase is a material developed by a germinating and growing organism, whether the growth of a grain or of a certain fungus, which secretes the diastase. That diastase has the power, when mixed with a gelatinized starch or solution of starch,
54 of converting that starch into sugar. If the diastase came from the air and was not selected, it would be a wild fungus. Genuine sherry is made without any fortifying but sherry material in this state is almost entirely the commonest material.

ARTHUR WILHELMJ, witness for importers, testified:

Direct examination:

I am a chemist. My particular line is fermentology. I am familiar with the manufacture, qualities, characteristics and materials and uses of wines, beers, ales, porter, sake, and kindred articles. Scientifically speaking I find the main difference between sake and wine consists in the contents of different acids and different contents of residues. Sake contains unfermented dextrines and isomaltose while wine does not contain them. There is dissimilarity in the matter of taste, and it has another flavor. Wines have a different flavor. I am an expert wine taster. I tasted sake. I have tasted wines. Comparing the taste of sake with that of wine I can only say there is a little appearance similar to wine but it is absolutely different from wine. One might think it resembles wine but if he goes into it by comparing the taste and different flavors he will find them different. My final conclusion as a wine taster is that sake has no wine taste. Sake has the smell you find in fermented beer mostly in yeast factories where lactic acid is used. The similarity between sake, ale and porter is that doubtless they all contain unfermented dextrines, and a light color which some beers possess. With
55 reference to the chemical composition sake is entirely different from wines, more like beers because the process of fermentation is similar to that used in beer manufacture. I cannot say that sake tastes like beer, ale, or porter. I find sake similar to beer as both contain some maltose, while in wine you have no maltose at all. Wine is fermented from what chemists call grape sugar. The fermentation in wine is generaly spontaneous, that is, pro-

duced by ferments in grape juice without anything being added to produce the ferment. The yeast of wine in this respect is absolutely dissimilar to beer, ale or porter, as in those you have to add some yeast to produce fermentation.

Cross-examination:

Diastase converts starch into dextrine, isomaltose and maltose, and yeast possesses enzymes which convert maltose into dextrose. Dextrose is present in grapes from the beginning. In all yeast factories lactic acid is always used to suppress the bacteria; at the same time some mould produces lactic acid spontaneously. Diastase is present in very small amounts in pure barley, and that is developed by a certain warmth of temperature. Diastase in sake is produced by aspergillus oryzae. That is present in rice in very small quantities because there is no grain that does not contain it. The diastase used in sake is a product of the aspergillus. It is a very difficult question to decide but probably diastase in rice is working by itself. It would not be sufficient by itself to make sake until treated in a certain way. If you treated rice as you do barley in making beer you would not produce the same result, because it is not strong enough. The
56 dextrose in rice has to be fortified, because the diastase in barley is easier to develop than in rice. I would not call the yeast in sake wild yeast; I would call it cultivated wine yeast present in the beer wild yeast. Cultivated yeasts that are used now were originally wild yeasts but after hundreds of years have become acclimated to conditions they are working in now. I have never seen sake made, but I have had an opportunity to study this in the colleges in Germany, and I have my degrees and have passed examinations on the subject.

LOUIS FALKENEAU, witness for importers, testified:

Direct examination:

I am a chemist. My particular line is technology and metology. I am familiar with the manufacture, qualities, and characteristics, materials and uses of wines, beers, ales, porters and sake. I was educated in Europe, at Zurich in Switzerland, Freiburg, Saxony, and Munich, Bavaria, and have taken degrees as a chemist. I served as assistant in the Royal laboratory in Munich.

I have as a chemist had occasion to examine wines, beers, ales and porter and kindred articles, and am familiar with their chemical composition and method of manufacture. I am familiar with sake and have compared it with wines from a chemical point of view. I found that sake was chemically different from wine so far as it contains substances which wine never contains, especially dextrines and possibly some maltose. I have found a similarity between the ex-
tract of sake and the extracts of beers. The extracts are simi-
57 lar. By extracts I mean residues that remain after evaporation, the non-volatile. I am an expert wine taster. I have tasted sake, such as Exhibit 2, and sake generally. To my idea, to a wine taster the dissimilarity is at once apparent. To an uncul-

tivated taste it might not be. There is no similarity in the taste of sake to beers, ales or porters, except that of the yeasty taste which some badly prepared beers have in common with sake. I have smelled sake. It does not smell like wine, more like beer. I would say that it had not the quality of a wine. The fermentation of wine is spontaneous. In ales, beers and porters it is not spontaneous but the yeast is added and causes fermentation. The acids found in wine are tartaric, and a little trace of lactic; or if badly handled more of it; there is also malic, and some succinic. In beer and porter, tartaric and malic are totally absent; there is lactic to some extent. In order to make wine there is a natural sugar called grape sugar in the material. There would be nothing there to ferment if there wasn't sugar. It is the grape or fruit sugar. You could not make wine with a cereal sugar.

Cross-examination:

I am not a professional wine taster, but I have a very fine wine taste and made it a profession at one time. Indirectly wine growers have consulted me as to taste. As far as I have looked into it the residue of sake is dextrose. I mean dextrine and maltose. I do not know in what quantities. I have not made any examination. These are the two characteristic residues I have looked into. The residues of wine are sugars that have been unfermented.

58 Q. Do you find some of that in sake and beer?

A. Sugars, yes, only they are maltose.

In sake the residue is 3 per cent, so far as I can find. The per cent. in wine varies from 1½% down to sometimes very low. In the beer it was somewhere near to sake. The volatile substances in sake are alcohol, possibly acetic acid. In wines the volatile substances are also alcohol, sometimes acetic acid if it has not been properly handled. The residues add taste; in beer for instance it plays an important part.

That which gives the peculiar taste to sake I should say was lactic acid. Of the volatile part of the beverages the most important is alcohol. The per cent. of alcohol in sake is 17½ per cent. The average in wines ranges from 3 per cent. to 5 per cent., etc. When I say 3% I am speaking of dilutions; I do not mean commercial wines. The commercial wines contain from 6 to 12, 18 etc., per cent. alcohol. An alcoholic beverage is a beverage that has been distilled; that is, from a technical standpoint.

H. J. JOHNSTON, witness for importers, testified:

Direct examination:

My business is that of ship and custom house broker. I have been in that business since 1887. I was in that business in San Francisco from 1887 to 1898 and became familiar with the trade and commercial designation of sake amongst merchants, from 1887 to 1898. I know the definite general name of sake in trade and commerce. I have dealt in it in my capacity as a broker and entered it for merchants who brought it here. I have seen it labeled sometimes in bot-

tles and sometimes in tubs. on the tubs there was no brand
59 except Japanese characters which I could not read. In the bottles I have seen the Japanese characters and sometimes "sake", different kinds from different brewers.

Cross-examination:

I never dealt in sake. I never bought a single bottle. I never bought any prior to 1897 in this country. Never saw it labeled rice wine until yesterday when I saw it here, and I have seen thousands of bottles in my business. I have gone around to all the importers to get samples of sake and I never saw any labeled rice wine. I made a point of scrutinizing the labels very closely just before this case came up.

Importers' Evidence Taken Before the Circuit Court in the Komada Case.

JOKICHI TAKAMINE, witness for the importers, testified:

Direct examination:

I have been in this country about fifteen years. I am a graduate of the University of Tokio as a chemist, where I received a degree as master of engineering & applied chemistry. I studied chemistry three years in Great Britain, chiefly in Glasgow University, and Andersonian University. I was sent to England by the Japanese Government for the purpose of studying chemistry. My studies being applied chemistry I paid special attention to the fermentation industry in general. While in England I visited different breweries and distilleries. I served as an apprentice at a chemical factory at Newcastle-
on-Tyne. After my return to Japan I was appointed Govern-
60 ment chemist in the Department of Agriculture and Commerce. My special subject was brewing sake. Then I was made director of the chemical section of the Department of Agriculture and Commerce of the Japanese Government. As such director I had about twenty other chemists under me. I occupied the office of Vice Commissioner and Acting Commissioner of the Patent Office. My investigations of sake brewing in Japan were in a general way with the object of making improvements in sake manufacture, and I have established several scientific brewing stations in different parts of Japan. I spent five years in investigating sake brewing, and during that time made sake brewing a special study. I made investigation of other kinds of breweries besides sake breweries as a matter of comparative study. I looked into the art of beer brewing as well as wine making. I have visited quite a few breweries in England and also quite a good many in this country. I have seen almost all breweries in Chicago, Peoria, and several in Cincinnati. The purpose of my visits to those breweries was that I, being the inventor of a certain process of fermentation, wanted to introduce my process into American breweries. I am a practical chemist and thoroughly familiar with brewing processes.

I have recently made an analysis of sake, and of wine, and of ale. I chemically analyzed the contents of this bottle (sake), Exhibit 2. The specific gravity of the sample of sake that I analyzed was 0.9928; alcohol, by volume, 16.42; extractive matters, 3.49; ashes, 0.09; volatile acid, 0.04; fixed acid, 0.27, calculated as lactic acid; glycerine, 1.35; maltose, 1.90; dextrine, 0.72; sulphuric acid, trace;
61 nitrogenous matters, 0.89; this is the analysis; the rest is water. The volatile acid is estimated as acetic acid. I found no dextrose in sake. I looked for it, but there was none. Usually dextrine and maltose are combined together and calculated as maltose, but inasmuch as the presence of dextrine is so different from the wine that you gave me to analyze, I simply mention here the facts.

I analyzed the Duff Gordon sherry Exhibit 4. The specific gravity was 0.9868; alcohol by volume, 20.06; extractive matter, 1.67; ashes, 0.49; volatile acid, calculated as acetic acid, 0.07; fixed acid, calculated as tartaric acid, 0.45; glycerine, 0.62; dextros-, 0.11; sulphuric acid, 0.24; nitrogenous matter, 0.10. I found no maltose or dextrine in wine. I looked for it. I found no tartaric acid in the sake, although I looked for it. I analyzed the contents of the bottle labeled "Peacock Ale." The analysis was, specific gravity, 1.0187; alcohol by volume, 9.95; extractive matter, 9.83; ashes, 0.51; volatile acid, as acetic acid, 0.05; fixed acid, as lactic acid, 0.44; glycerine, 0.24; maltose, 3.39; dextrine, 3.31; sulphuric acid, 0.10; nitrogenous matter, 0.49. I found no dextrose in the ale. I looked for it.

I found no lactic acid in the wine, calculated as tartaric acid.

Maltose is a product of the action of diastase on starchy material. The function of maltose in fermenting processes is the stage from which alcohol is made by the action of yeast.

Sake is made from rice. The rice is first husked, then the brown coating or bran is removed by suitable means. This is thor-
62 oughly washed with water, then steamed, for the purpose of gelatinizing the starch; a portion of that rice is taken, cooled to a body temperature; a small quantity of spores of fungus called moyashi is added and thoroughly mixed. Then the mass is put into a growing room. After a certain number of hours the mass is spread on wooden trays and allowed to remain there at the proper temperature and humidity for a period ranging from 30 to 50 hours. At the end of that time the steamed rice would present a white velvety appearance. Then the substance is taken out of the growing room. The substance thus obtained is called "koji," and it will be found that it has acquired considerable diastatic power; that is to say the mass will now have the power of converting starchy material into sugar. This substance, koji, corresponds to that of malt in beer brewing. A portion of that koji is now mixed with a fresh portion of steamed rice with the proper quantity of water and allowed to stand, with the proper manipulation, for a period of about two days. During that time the mass will acquire a sweetish taste and eventually acquire an alcoholic taste. The mass thus obtained is called moto or shubu. This mass will be found to contain a very active yeast ferment in abundant quantity, and the mass corresponds to the batch of yeast in beer brewing. Into this moto a fresh quantity of

steamed rice and koji is added and allowed to ferment. After a certain period another fresh portion of steamed rice and koji is added until a fourth portion of the steamed rice and koji is added. The whole thing is allowed to ferment out. Then the mass is fil-
63 tered, pressed through a linen bag, and the filtered liquid is allowed to settle. The clear portion thus obtained is sake, the popular Japanese alcoholic beverage. When freshly finished it naturally contains some quantity of carbonic acid gas. Before being put into a cask or bottle, sake is usually subjected to a temperature of about 140 deg. F., a process somewhat similar to pasteurizing in beer, and during this process all the carbonic acid gas contained therein will escape to the air, producing a non-effervescent liquor.

In a brewing process malt is the converting agent; that is, it is used for converting starchy material of the grain into sugar from which alcoholic beverage is fermented by yeast. I have just described the process of making koji, which corresponds to malting process in the European and American way of making beer. Thus I can say that the koji process is a particular malting process used in sake brewing. The diastase in beer brewing results from germination of the grain used, usually barley. Diastase in sake brewing is produced by the growth or the germination of this particular fungus that has been added to rice in the early part of the process.

The object of yeast in any brewing process is to convert the sugar into alcohol; the yeast in brewing beer is artificially added.

In the manufacture of wines, the sugar already exists in the fruit, and therefore no diastase or diastatic action is required in order to obtain the alcohol. A diastatic action is a necessity in the fermentation of a grain. When one wants to produce alcohol from starch, it must be changed first into sugar, and in order to change into sugar the diastase is universally used for the purpose. The
64 process of making sake may be termed brewing in the sense that beer is made.

I have read the method of making sake described in the Nishimiya record. The process there described is a brewing process under the scope of the definition that I have just given. A grain must first be malted in order to develop a diastase; that is the only way I know.

I have drunk sake since I was a boy. It is drunk sometimes cold and usually hot. From cold up to the temperature one's tongue can stand. The highest degree is something like 110 to 120. I can't just offhand say. It is usually drunk in a small cup. Sometimes a very large cup is used with a diameter of 7 or 8 inches, with about one-fifth of its diameter in depth. By the poorer classes sake is taken in almost any vessel that can be obtained. I have drunk beer so as to become familiar with its taste. I have drunk wines to a sufficient extent to say that I am familiar with the taste of wines. I was one of the jurors of award at the New Orleans Exposition on fermented beverages which included all kinds of fermented liquor, including wine and beer, but I was particularly called upon as a sake expert.

Sake tastes entirely different from wine. Sake has its own charac-

teristic flavor, which is different from any other beverage that I have ever tasted. I always import sake from Japan, a good many thousand miles away, because nothing else suits me. I like the taste of sake; no other beverage just takes its place. The beverage that most resembles sake in taste is I think, distillers beer. Distillers
65 beer is a technical term used in a distillery of alcohol. It is a fermented mash made from cooked grain and some form of diastase, say usually malt, flavor something like distillers beer before it is distilled. That is the nearest beverage I know of which in my opinion resembles sake in flavor or aroma. I cannot think of any other.

In a broad sense any beverage which has similar alcoholic strength tastes similar in that respect, because the first element that gives it taste is the alcohol. Sake tastes differently from wine, except only in alcoholic strength. There are other determining features. Among others is flavor and taste. The flavor and taste, except the impression on the tongue due to alcoholic strength, are totally different. In alcoholic strength it is similar to wine. In taste, flavor, other than the prickling sensation caused by the similar percentage of alcohol it is different. The prickling sensation is the only point that is similar; others are all different; all other flavors and tastes are different, and for instance if any one sent me a bottle of either of these wines as sake I would send it back to him. I would want the sake, because the flavor and taste is entirely different.

By grain yeast, I understand the yeast obtained during the fermentation from farinaceous articles. The presence and use of a grain yeast in the making of a beverage influences its taste. In a beverage I can usually tell the presence of a grain yeast by its flavor. A beverage containing a particular kind of acid would necessarily taste different from a beverage containing less or none of that acid.

Maltose and dextrose are both sugars. Maltose can be
66 converted, changed into dextrose by further action of diastase or similar substance such as weak acid. While dextrose is the ultimate end of the sugars the maltose is a sort of intermediate of the sugars. There is a further process necessary for the maltose to go through with before it becomes a sugar.

The spores of fungus and the theories concerning them are a matter of certain knowledge. I have observed sake yeast under the microscope. I could not identify the appearance indicated by the diagram, made by the witness Dr. Wyatt, as a sake yeast. (See Wyatt's testimony, pp. 155-156, post.) I have never seen a sake yeast look like that under the microscope.

The making of sake is more similar in many respects to the process of making beer than to the process of making any other beverage. The definition in the Standard Dictionary of the act or process of making malt is a correct definition. It reads as follows: "The starchy material, either barley, wheat, rye, oats, corn, rice, or potatoes, is allowed to germinate, so that its constituents may be made more soluble and suitable for fermentation." In making sake rice is not allowed to germinate. Rice is not itself germinated, but the

spores of fungus sown on rice is germinated and made to undergo a very similar process as described there. That does not cause the rice itself to germinate.

Cross-examination:

Maltose and dextrose are both kinds of sugars. Dextrine is not sugar. I am the inventor of a process of fermentation which I tried to have introduced in the breweries of this country, but it was not introduced. That was a process of conversion as well as fer-
67 mentation. The chief object was to introduce a new form of diastase, a new kind of diastase. The process is very much similar to what I have described in the sake making.

The spores of a fungus are added to the rice in the production of sake. Those spores are cultured. The process of culturing spores has been in existence probably ever since the sake process was made, four or five hundred years or more. It is not a fact that sake today is produced by putting the steamed rice out in the open air and allowing spores to settle on the rice. The process of taking steam rice, putting it out on mats in the open air is not to allow the spores to deposit on that rice from the air. That is only the cooling process. When the rice is steamed, of course it is very hot and they have to cool it. If the steamed rice should become infected with spores from the open air it would be dangerous, it would become infected. It would spoil the sake, and therefore for that reason the sake brewer, as much as he can, tries to avoid it. They expose it as short as they can. You have to cool the steamed rice to sufficient degree so that it will not kill this moyashi.

I have made experiments for the purpose of obtaining the yeast separate from the diastase in the sake and succeeded. Taka-diastase is named after me. The definition of malt given in the Standard Dictionary follows: "Grain that has been artificially germinated by moisture and heat," is my understanding of the term "malt" as applied to beer brewing. The koji making is similar. We do not have the term malt in the Japanese language.

68 Q. What is the translation of malt that you would give in Japanese?

A. The translation is a sprouted grain. The Japanese word corresponding to malt is mugi moyashi. Moyashi is the general name which embraces koji sprouting as well as the sprouting of barley or wheat. If the English word "malt" meant the germination of a grain, moyashi would fit it, in the Japanese sense.

In the making of sake the rice does not sprout itself. The rice itself does not germinate. The definition of malt as given in the Standard Dictionary would not apply to this rice but to the spores of fungus. The rice would not be malted in the sense that it has been artificially germinated by moisture and heat. Mugi is the general term embracing wheat or barley. It does not embrace rice. When I translated the word malt as mugi moyashi I mean a barley or wheat which is sprouted. Moyahsi is the general term for sprouting. If you prefix mugi then that will correspond to the usual American or English malt. Mugi moyashi would not correspond

to this rice which has the fungus grown on it, but if you say kome moyashi then it is the sprouted rice. I would not translate the word as kome moyashi, because in this country, it is wheat or barley that is usually used. Rice will germinate. Steamed rice, of course will never germinate. Mugi moyashi would not apply to this infected rice, but as stated before moyashi is a general term for sprouting or sprouted substances, and by prefixing the name of the grain, you can specify any sprouted material you wish to refer to. For instance,
mugi represents the general term embracing barley or wheat.
69 If you substituted kome as a prefix which means rice, then
you have rice malt.

Q. Would you say rice malt or rice sprouted?

A. Rice sprouted, yes, rice sprouted, that is right.

Kome moyashi means sprouted rice. That is, in that sense kome moyashi, that means, corresponds to mugi moyashi, namely American malt and sprouted rice. The rice itself would certainly sprout itself. In this sake operation the rice does not sprout itself. So far as the sake operation is concerned you can't use that term kome moyashi, but we use other kinds of sprouting or malting in making a sake.

In the case of beer you take a natural grain, and as you have read it there, moisture and temperature make that grain sprout, and that process of sprouting produces or generates diastase in the grain. In the case of sake brewing we must have diastase there; that is what we are after. To get the diastase in sake brewing we plant this microscopic spore, and that microscopic spore is a grain by itself. That little microscopic grain, as it were, will sprout in this growing room that I have talked about. During the growth, the diastase is germinated and therefore that diastase in the case of sake is produced by the sprouting of those miscroscopic plants; while in the case of beer the sprouting is of the grain that we can see by the naked eye. On that basis, therefore, both are sprouted; only in one case it is the grain that sprouts, as in the barley malt, while in the other case it is
a little plant which sprouts in the rice feeding on the rice.
70 I am familiar with the fermentation of wines. In the case
of grape juice the yeast resides on the outer coating of the grape skin.

Q. After the rice in sake making is all ready and is put into the water and a fermentation is allowed to start, from that point on is not that the identical process which is followed in the making of wine, after the juice has been expressed and it is put into the tubs and allowed to ferment?

A. No sir. That part is similar to the latter part of beer brewing, but in the case of sake both conversion and fermentation goes on simultaneously. That is where the sake brewing is totally different from that of wine. In the case of beer, starch is converted into sugar by the diastase of malt and then the batch of yeast is artificially added and fermented; that is the general principle of the fermentation in beer making. And then in sake making starch is converted into sugar by the diastase of koji and fermented by the yeast of moto. The process is similar to that of beer making in that both are made

from starch by artificial conversion and artificial fermentation; but sake making is different from beer making in this respect that the conversion and fermentation takes place simultaneously. In the case of wine no artificial conversion is necessary for the reason that the sugar is already there and no artificial addition of yeast is required, because the yeast is already there. Those are the comparisons of the three different processes. In the sake process after the starch of the rice has been converted into sugar, the further process is the conversion of the sugar into alcohol and carbon dioxide by the saccharomyces, which is present in the moto.

71 Q. And in the wine process after the grape juice is pressed from the grapes, the process is the conversion of the grape sugar into alcohol and carbon dioxide by the yeast which is present in the grape, is it not?

A. Chemically the principle of the fermentation of course is the same.

In each case, the sake and the wine, after the sugar has been converted in the sake, the operation is precisely the same as in the wine, as far as the principle of fermentation is concerned. After we have the rice in the water, preparatory to fermentation we make a moto, and there is a batch of the yeast there, and if you add anything fermentable to it, of course it will ferment. The starch of the rice in this tub is not converted into sugar prior to adding the yeast.

In the beer you always convert the starch of the barley into sugar before you add the yeast. You don't boil any extract from the rice before you add the yeast. You always boil the malt extract in the making of beer before you add the yeast. You don't boil grape juice before fermentation. The fermentation of wines is at ordinary temperatures. Beer is brewed always in cold temperature.

I never knew a beer that was produced without hops, except distillers beer. That is not a commercial beer, that is simply an intermediate stage in the making of beer. The original idea of using hops is to make the beer keep. It would not keep without the hops. It is antiseptic and a preserving agent. You don't need any such preservative in the making of sake, nor in the making of wine. Fermentation has to cease in the sake before it becomes a merchantable article.

72 In the case of sake the rice will not malt because it is steamed and cooled, and the ordinary sprouting process will not occur in rice used in sake. In the making of sake alcohol is never added. If beer is heated to a temperature of 140 degrees F., in an open vessel carbonic acid gas will be expelled.

You could not make sake by the ordinary brewing process used in making beer. I am familiar with the sake yeast germ, and with beer yeasts and wine yeasts, to some extent.

Q. Will you look at the paper which I hand you, and state whether the diagram shown of sake yeast corresponds to your idea of it? (See Wyatts testimony, p. 155–156 post). I wish to state in asking this question that the witness who produced that testified it was drawn from the yeast found in sake, which as you have stated, has been subjected to a heat of 140 degrees.

Mr. CRANE: I object to the witness testifying in regard to this diagram, because, as previously stated by me, it is not properly proven to be a correct representation, being simply made with a pencil by the witness; it is not a photographic reproduction, and is incompetent, immaterial and irrelevant.

(Objection overruled. Exception.)

A. This second diagram on this paper and marked "Yeast seen by the microscope in sediment from sake", and in brackets "poor condition", from the picture itself I don't think anyone can identify as sake yeast. From this diagram I cannot identify that as a sake yeast; that is a fact. Sake yeast does not present the characteristics of lengthened cells nor chain cells. Its appearance is very much
73 like beer yeast cells only a good deal smaller, with eggs in it. The sake yeast proper is an egg shape, and a good deal smaller than that of beer, but very similar in shape. It has not the appearance of a sausage. I have examined sake yeast taken from finished sake. The second picture on the paper referred to looks like a sediment where, outside of sake yeast, any other microbes that exist will settle down. I cannot identify from this picture that it is sake yeast. I have tasted Exhibit 3—Jimenez & Lamothe sherry. It is some kind of wine. I find no similarity in taste or odor between that and sake. I can tell the difference at once.

I suppose sake and Exhibit 3 are of about the same alcoholic strength. The taste to me is entirely dif-ent. Flavor and smell are different. Now you put that in the mouth and it is different. There is no similarity in the taste between that and sake; from my standpoint, it is not like. All those alcoholic beverages are more or less similar in the way that they contain alcohol, and if you put whiskey and water to about the strength of wine or sake, it in that sense tastes similar, because that sensation on the tongue is there made by the same percentage of alcohol contained therein. Therefore in strict sense in tasting, you have to draw a line there; otherwise any beverage containing the same percentage of alcohol in one sense can be said to be similar. The sake (Exhibit 2) differs from the wine (Exhibit 3) in the flavor. I mean analyzing in this way that the similarity of the percentages of alcohol is liable to make all that kind of things taste alike; it is similar in that respect; no one can deny that.

74 The sake is closer to that style of wine than to any beer that I know of in its taste.

Q. I wish you would taste a sample from Exhibit 4, Duff Gordon sherry, and state whether you find any similarity between sake and that Duff Gordon?

A. I think the sake is closer to the Duff Gordon sherry I have just tasted than it is to any beer that I know of, on the same principle that I stated, that they are about equal in alcoholic strength, the first sensation on the tongue is the taste of alcohol; but when it comes to flavor and real taste, one is distinct from the other as these two. The Jimenez & Lamothe sherry is closer to the Duff Gordon than it is to sake. I find quite a difference in the taste between the Jimenez & Lamothe sherry and the Duff Gordon sherry.

GEORGE O'NEILL, witness for the importers, testified:

Direct examination:

I reside in Honolulu. I am employed by W. C. Peacock & Co. They are in the liquor business. This bottle of Emperador Sherry was imported from Spain. I selected and brought it here. It is a regular brand of sherry imported by W. C. Peacock & Co. They import approximately about 200 cases a year.

This is a bottle of Budweiser beer, brought from my firm this morning.

I have charge of the rectifying department and the bottling with W. C. Peacock & Co. My experience of the keeping properties of sake are that it will last a little longer in bottles than in tubs; even then not longer than six months. The bulk of sake is imported in
75 tubs. After six months it commences to cloud up and to sour, and becomes worthless and unsalable. I have not had any experience of that kind with any wines. I am familiar with the tasting qualities of wines, liquors, and sake so as to be able to tell differences or similitudes between them. Tasting the sake and comparing it with the Emperador sherry there is a decided difference. There is no similarity in taste. Compared with the Duff Gordon sherry there is a difference, and no resemblance in taste. Compared with the Jimenez & Lamothe sherry there is no resemblance in taste or smell. Compared in color with the Budweiser beer the sake is just about a shade lighter; then the beer is not clear, it is clouded. Compared in color with the A. B. C. beer it is just about the same as the Budweiser, only the A. B. C. is a little clearer. I have never known sake to be designated by any other name and never have known of any that I have imported by the name of rice wine, or by any other name than sake.

Sherry is imported both in bottles and casks. I do not know of any imported sherry that got bad.

Cross-examination:

The beers that I examined are exceptionally light. The ordinary lager beer is a little darker than sake. I understand that the firm with which I am connected is very much interested in sake protests. My experience in the matter of tasting wines has been about fifteen years, most every day of my life. I guess they ran into the hundreds of different kinds of wines. I have had experience in San Francisco with the California Champagne Company and the Crown Distilleries. In the California Champagne Company
76 I was in the wine cellars and in the Crown Distilleries also in the wine cellars and in the rectifying department. I have sampled in a business way about ten or fifteen different brands of imported wines and the domestic wines run up into the hundreds. I find no similarity whatever between the sake and the Jimenez & Lamothe sherry.

The sake bears a little resemblance in color, but not in taste to the Jimenez & Lamothe sherry. This also applies to the Duff Gordon sherry. Considering all characteristics I think that Jimenez &

Lamothe is closer to Burgundy than it is to sake. I find no resemblance in taste between the Burgundy and the sake. No resemblance at all except that they are still.

I have had wines that went bad, mostly red wines in barrels. No wines in bottles that went bad.

AMBROSE WIRTZ, a witness for the importers, testified:

Direct examination:

I reside in Honolulu. I am manager and head salesman of the Tobacco and Liquor Department of H. Hackfeld & Co. Ltd. I have had a practical experience covering two years extensively, and five years more or less with wines, liquors, beers, and sake with respect to their qualities, taste, odor, appearance and color. I am familiar with the article called sake, with sherry wine and with beer. Comparing sake with cider I find the greatest similarity in color. As between sake and ale the ale is cloudy, while the sake is clear. The cider naturally is sparkling. The sake is more pale while the cider is more golden. There is a vast difference in color between
77 the sake and the Emperador sherry. The sake is a paler color than the Budweiser beer as in the instance of the cider. There is the greatest similitude between the sake and the Budweiser in odor. The alcoholic strength of the sake is greater: it is more pungent. In the ale the similtude in odor is larger. The odor of the Emperador sherry is overpowering over the odor of the sake. The Duff Gordon sherry is still the same; it is overpowering. The odor of the cider is more acid. There is a marked similarity in taste between the sake and the Budweiser beer. The ale in taste is more pungent than sake, but the after taste in quite similar. The taste of the Emperador sherry is decidedly more elastic, and stronger. There is a substantial resemblance to the taste of sake only so far as alcoholic strength goes, but not in flavor. There is absolutely no similitude in taste between sake and Duff Gordon sherry; the taste of the sake is refined while the sherry is absolutely not what we would call polished. Wine improves with age, sake deteriorates. The keeping quality of sake is generally calculated not to exceed three and one half to four months. After that it will be what we style flat. In that condition it is absolutely worthless. Water will reduce the alcoholic strength of wine. It does not spoil the quality. It is impossible to mix water with sake without affecting the quality of the sake. It would turn it flat within a couple of days time. The A. B. C. Bohemian beer is darker than sake, the same shade.

Cross-examination:

I think that the sake which I have tasted this morning represented by the Exhibit 2 in this case, is of a very strong
78 quality. I don't think it has been spoiled at all. I have been handling sake for about 10 years. Have had it spoil on my hands several times during that time. Always in tubs. I have seen beers very much darker than sake, in fact, most beers

are darker. The alcohol has a good deal to do with the taste of all spirituous beverages—with the strength. Comparing the different wines which have been introduced this morning, the wine which most closely approaches the sake in color, is the one last introduced as Exhibit 3 (Jimenez & Lamothe sherry). The color of the Jimenez & Lamothe sherry is closer to sake than the color of the Emperador sherry, which is called a dry sherry. We do not import a sherry similar to the Jimenez & Lamothe sherry Exhibit 3. I know of no wines which cannot be imported and kept in this country on account of the fact that they will spoil in this climate. I refer not only to the climate of Honolulu but also to the climate in the States. I never heard of any quality of sherry that will not keep in the States. I have had no business experience in the States in wine but did have in home consumption. I find that the sake is paler than Emperador Sherry. Similarity in the taste is out of the question. The sake is decidedly closer to one of those beers in the taste than it is to one of the sherry wines.

Q. I wish you would examine a portion of Exhibit 3, Jimenez & Lamothe sherry.

By Mr. FITCH:

The Appellee objects to any introduction of the Jimenez & Lamothe sherry on the ground that it is shown by the records
79 in this case that it is a special importation made by the Government and that no Jimenez & Lamothe sherry has ever been imported into this country and placed on the market.

By Mr. LEVETT:

Q. How do you find that the color of Exhibit 3, Jimenez & Lamothe sherry, compares with that of sake?

A. The sake is still paler. Comparing the sake with all the beverages before me that have been introduced this morning I find that the sake comes nearest in color to the Budweiser beer. The Emperador is a dry sherry.

After tasting the Jimenez & Lamothe sherry I find no similarity between that and the sake in taste. The sake has a fresh taste while the wine (Jimenez & Lamothe sherry), is what you would call flat. I most generally taste all importations that we receive before they are placed on the market, and if there is any comment made by any customer we make a thorough examination of the matter, and tasting is one of the principal parts thereof. To the best of my ability as a taster of wines, I can find no similarity between sake and Jimenez & Lamothe sherry. To the best of my ability there is a greater similarity in taste between the sake and the Budweiser beer than there is between the sake and the Jimenez & Lamothe sherry. I taste about six or eight different brands of imported wines a year and two or three qualities of each brand. There are not very many qualities. I sample, approximately, about ten or fifteen samples per month representing the different brands that come to me during the year. Having tasted the Burgundy and the sake, I find

no resemblance. Comparing the Duff Gordon sherry and
80 Burgundy wine there is similarity between those two as far as the flavor is concerned. I find that there is decidedly more similarity between the Burgundy and the Duff Gordon sherry, than between the Duff Gordon Sherry and the sake. I do not find more difference between the Burgundy and the Jimenez & Lamothe sherry, than I do between the Jimenez & Lamothe wine and the sake. Taking all the characteristics of color, odor, taste, alcoholic strength, and any other characteristics which go to make a wine, it is my opinion, as an expert wine taster, that the Jimenez & Lamothe wine is closer to the Burgundy than it is to the sake, with the exception of color. The Jimenez & Lamothe is stronger in alcoholic strength than the Burgundy. It is not stronger than the sake. Taking all the characteristics of sake, color, odor, taste, alcoholic strength, carbonic acid gas, sake most closely resembles a flat beer than anything else I know of.

By Mr. FITCH:

This bottle of A. B. C. Bohemian beer is darker, the same shade as sake. I never saw any sake that was effervescent.

D. H. LEWIS, a witness for the importers, testified:

Direct examination:

I reside in Honolulu. My business is that of wine and liquor dealer. I have been in business ten years. I import wines and liquors. I deal in sake. I am familiar with the taste and qualities of the different wines and liquors that I deal in.

I cannot see very well, but as far as my eyesight goes I consider the sake of a slightly darker color than the A. B. C. beer.
81 The taste of the sake has a very pungent strong alcoholic taste: sharp: and the taste of the beer is of a flat taste and not so sharp, and very much weaker in taste. I do not find any similitude in the smell. I find no similitude in smell to the Budweiser beer. The color of the sake is a good deal lighter than that of the beer. The sake has a strong, sharp, pungent, alcoholic taste, whereas the beer in comparison with the sake has a much milder flavor and does not resemble the taste of the sake in any way. I find a very slight similitude between the taste of the sake and that of Bass's ale. The color of the sake is very light yellow and that of the ale is more of a reddish color and darker. The sake is clear, the ale is cloudy. The color of the Emperador sherry is of a golden hue and that of the sake is a very light yellow color. I find no similitude in the odor, and no similitude in the taste. The sake is of a light yellow color and that of the Duff Gordon sherry is a marked darker yellow hue. There is no similarity in smell between the two, and none in taste. Age improves wine, it spoils sake, makes it unfit for sale. I have had hundreds, probably thousands, of dollars' worth of sake spoil on my hands. It will keep anywhere from three to six months so that it will be merchantable. I import sake to a considerable extent. Sometimes it is designated on the

invoices and labels as sake but some dealers designate it as rice sake. It is not designated anywhere as wine. Taking all these wines, the Jimenez & Lamothe, the Duff Gordon sherry, and the Emperador sherry, sake does not in taste or smell resemble any of them.

82 Cross-examination:

I have been protesting on my importations of sake between three and four years, to the best of my knowledge. I never saw a bottle of sake labelled wine. I do a yearly business of $100,000 in wholesale and retail wines and liquors. We do not import any kinds of wines from foreign countries. We buy foreign wines here. We handle about six different kinds. We bring in from the States between eight or ten different kinds of domestic wines. I do not pose as an expert wine taster in the real sense of the word, but I claim that I am a good judge of wines.

Q. Please examine a portion of Exhibit 3, Jimenez & Lamothe Sherry.

By Mr. FITCH:

(Same objection.)

The color of the sake is a very light yellow hue, that of Exhibit 3, Jimenez & Lamothe Sherry is of a darker and more golden hue. I do not find any resemblance between them in the smell nor any resemblance in the taste at all. The color of the Duff Gordon sherry is a darker yellow than that of the sake. There is no similarity in taste between them. I find no resemblance between the Burgundy and the sake in color nor any resemblance in the taste whatever.

I find more difference between the Jimenez & Lamothe sherry and the sake, than between Jimenez & Lamothe sherry and the Emperador sherry. I do not find any similarity between the Jimenez & Lamothe and sake. I find no similarity between beer and Jimenez & Lamothe sherry either. The sake is closer to beer than it is to the Jimenez & Lamothe sherry. In my judgment
83 the differences between Burgundy and the Jimenez & Lamothe sherry and between the sake and the Jimenez & Lamothe sherry are about equal. To the best of my tasting qualities I find no resemblance between any of these beverages.

WILLIAM LISHMAN, witness for importers, testified:

Direct examination:

I reside in Honolulu. I am manager of Macfarlane & Co., Ltd., wholesale wine and liquor merchants. I have been engaged in that business 28 years. I am not much of a drinking man. I have had to sample wines and drink them at different times, but I cannot say that I am a man that indulges very often. I am sufficiently familiar with the taste of wines to be able to distinguish them. I am acquainted with the article called sake and have tasted it once or twice, I don't think oftener than that. That is sake (smells with out tasting). I tasted by smell. There is no similarity in taste or smell

between the Emperador and the Duff Gordon sherries. The Jimenez & Lamothe is something like the Duff Gordon in smell. In smell it does not compare with sake. The sake does not resemble the Emperador, the Jimenez & Lamothe, or the Duff Gordon in smell or taste to me. It is a different flavor altogether. The A. B. C. beer is a little shade darker than sake. The Budweiser is nearer in color to the sake than the other is. It is about the same. The ale is all cloudy and the sake is clear, and the ale has more of an orange tint.

Age impoves wine. It kills sake. Sake is no good after three
84 months. I have imported sake from the time it first came into this country until about a year or eighteen months ago. Sake appears sometimes on the invoices as rice sake. Sake is not like wine in any particular.

Cross-examination:

I have protests filed before the Board on sake. I have been protesting on sake about three years. I do not always sample wines before I order them, but I do sometimes sample wines personally; as a rule I have a man who does the tasting. I have sampled in my life fifteen or sixteen different kinds of wine. I first tasted sake about twelve years ago. I have tasted it ony two orthree times because I never liked it. I have sampled eight or ten imported wines. The Emperado sherry is about as dry a wine as I ever tasted. I think it is drier than the Duff Gordon. Comparing the sake with the Jimenez & Lamothe, the wine, I find no similarity between the two, whatever. The sherry is a little darker. In taste I find no similarity whatever. I find a greater difference between the sherry and sake than I do between the sake and the beer. I find no resemblance between Burgundy and the sake in smell or in taste. The Jimenez & Lamothe sherry is entirely different from the sake and also different from the Burgundy. The sherry and the Burgundy in the after taste are more alike; they are more similar than the sake is to either of them. Considering all the characteristics, color, alcoholic strength, taste, odor, and general characteristics, I find that the Jimenez & Lamothe sherry is more similar to the Burgundy than it is to the sake. Sake will go

bad under seal in about nine months' time. I have never
85 heard of any wines that could not be imported into the States because they could not stand the climate. I have had claret go wrong. If exposed too long a claret will turn sour. The sample of sake (Exhibit 2) is good sake. Considering the general characteristics of sake, I would say that it is most similar to flat beer. Of drinkable beverages, I think it is nearer beer than anything else. I think that sake is a long way closer to beer than to that Jimenez & Lamothe sherry. I sell sake most to the Japanese. I never sold it to any outside of Japanese when I had it.

M. A. GONSALVES, witness for the importers, testified:

Direct examination:

I reside in Honolulu. I am one of the members of the firm of Gonsalves & Co., dealers in wines, liquors and groceries. I have been twenty years in that business in Honolulu. I am somewhat ac-

quainted with the taste, odor, color, and qualities of the different wines and liquors that I deal in. I am not much acquainted with sherry, because we deal very little with sherries, but I can tell the difference. I know sake. There is a big difference in color between sake and Emperador sherry. The sherry is the darker. There is a big difference in the smell too. There is difference in the taste; there is no resemblance. This Duff Gordon is a very poor sherry. There is a big difference in smell between it and sake. There is a difference in taste. Compared with the Jimenez & Lamothe, which is a dry wine, there is no resemblance in taste to sake. There is a big difference in smell between the wine and
86 the sake. The oldest wine is the best. Age improves it in sweetness and taste. If it is wine it never spoils. Sake spoils with age so far as I know. I saw some spoil on our own hands. It is clouded, and sometimes affects the taste. Tub sake will spoil in maybe four to six months; if it is exposed it may inside of sixty days. It is the practice to keep it in cold storage to prevent its spoiling. I am not acquainted with bottled sake imported, although I also sometimes import sake. I do not import any sake called rice sake. Our invoices read sake. I have never seen any invoices that read rice wines; it might, but I am not acquainted with it. I have never seen it.

Cross-examination:

I have protests pending on sake before the Board of General Appraisers. I have had some tub sake spoil on my hands about four or five years ago. I have been handling it since sake came into the country. I do not remember the date, about ten years ago. I have had sake spoil on me during that time several times,—always in tubs. We import sake. Some day we may taste wine more than once a day, sometimes once a week. Lately we import only very little wines; only champagne from France. But we import Madeira from Oporto and from Madeira, where I come from. My firm has had occasion to handle since I have been in business, port, Madeira, sherry, claret, two kinds of wine not known here, made in Portugal, called Goulares, a table wine something like Burgundy, made out of black grape. Sake more nearly approaches A. B. C. beer probably, and a brand from Seattle called Olympia, than it approaches the Duff Gordon and Jimenez & Lamothe sherries.

87 Q. Consider the taste and say if you think that sake is more similar to the Jimenez & Lamothe sherry than it is to beers?

A. The sake is naturally different in taste in every respect, in color, taste and smell.

Q. In your opinion is there any similarity whatever between the taste of the sake and the taste of the Jimenez & Lamothe wine?

A. No sir, there is a big difference. Considering all the characteristics, color, alcoholic strength, odor, taste, and any other characteristics that may be present in wines, I consider the Jimenez & Lamothe sherry is more similar to the Burgundy than it is to the sake in taste.

Dr. F. H. HUMPHREYS, witness for the importers, testified:

Direct examination:

I reside in Honolulu. I am a physician. As such I have occasion to know the qualities of wines, liquors, and so forth, and prescribe them for my patients. I know their constituents. In my life I have been brought up to drink wine since I was five years old, at my father's table and at my grandfather's table. I think I drink sherry every day of my life. I have bought wine for my father at sales on my own judgment, and my judgment has turned out well. Ten years ago I traveled with a wine merchant down through Gibraltar and the Mediterranean, and he taught me the different grades of sherry, the blending of sherries, the difference between low priced and high priced sherries, sherries running as high as four
88 pounds to the bottle. From this experience I consider myself as an expert above the average. I have tasted sake during the last eight years. Comparing sake with the Emperador sherry I cannot imagine that anyone could mistake the color. The sake is nothing like any sherry I have ever tasted. It has a metallic taste. It has no nose at all. The sherry is good sound sherry. There is no resemblance between the sake in evidence and the sherry. Comparing the sake with the Duff Gordon sherry they are practically the same in difference, only this is not so well marked, has not such a big nose as the sherry I just tasted. Of course it is a drier sherry. It has no resemblance to the sake in taste, or smell. It is more difficult to get the taste of sake out of your mouth than of the sherry. The Jimenez & Lamothe sherry has less nose than any of them. It does not resemble sake in its smell. It has less character than the other two I have tasted, but it is sufficiently defined to allow of its being sherry. You could swear to it. In taste it is nothing like sake. There is no resemblance between the Emperador sherry and sake in taste. If you took a still beer, a beer in which there is no carbonic acid gas, it would be less like the sherry (Jimenez & Lamothe) than it would be like the sake. It would resemble the sake more if the beer were flat. Taking all ordinary characteristics there would be no possibility of my mistaking sake for wine. As a physician I have a scientific knowledge of chemistry. I never heard of any beer made from grape juice. I never heard of any wine being made by brewing like beer.

89 Cross-examination:

The Emperador sherry is not a dry sherry. There may be said to be some faint form of resemblance in taste between Jimenez & Lamothe sherry and the sake. I find precious little similarity in taste between Burgundy and the Jimenez & Lamothe sherry. I find more difference between the Jimenez & Lamothe sherry and claret than between the Jimenez & Lamothe sherry and sake. If sake were handed me as a beverage and I did not know what it was, but was asked what beverage it most nearly resembled in its appearance I should say Hock or Rhine wine.

Q. And if you were asked to determine from the taste what class

of beverages it most closely resembled, would you say it was like a wine——

A. I did not say it was like a wine.

Q. You would not consider it like a wine?

A. I have never tasted a wine anything like it.

As to odor I would not say that the Jimenez & Lamothe was closer to the sake than to the Burgu-dy. They are absolutely different. This wine you now hand me is a low grade of hock. The designation of Reisling California wine would aptly describe it. There is as much difference between the Jimenez & Lamothe sherry and the Reisling as there is between the Jimenez & Lamothe sherry and sake. Sake is like no wine that I know. This sherry here has been referred to over and over again as sherry, but it is not a true sample of sherry.

I should say that probably the Jimenez & Lamothe sherry is slightly higher than 17 per cent alcohol. I give Burgundy
90 less than that. If there is any resemblance at all, the Jimenez & Lamothe sherry resembles the sake as much as it would the Burgundy. There is no question that the Jimenez & Lamothe sample is a wine.

Q. Do you not detect a very strong sherry flavor in sake?

A. I do not really.

Q. Would you not say, if you did not know what it was, that it resembled sherry in taste?

A. I could not.

Taking into consideration the carbonic acid gas, I would say that sake was more similar to Jimenez & Lamothe sherry than it is to beer, because beer sparkles. In alcoholic strength it is nearer to the sherry. Taking away the sparkling, I would say they were closer in taste, it might be closer in flavor. If sake is like anything, it is more like Chinese Sam Shu. Of all beverages that I have run across, aside from Sam Shu, sake comes closer to the Jimenez & Lamothe sherry than anything I have ever seen.

Q. There is more resemblance between the Jimenez & Lamothe and the sake than there is between the Jimenez & Lamothe and the Burgundy?

A. I want it to be understood that there is a big difference between the two.

Q. Considering all characteristics, taste, color, alcoholic strength and any other characteristics that constitute a wine, state what difference you find between the Jimenez & Lamothe and the sake on one hand, and the Jimenez & Lamothe and the Burgundy on the other.

A. The sake has a metallic flavor; the other two have a
91 vinous flavor. First of all they have the vinous flavor, these two, Sherry and Burgundy. The Burgundy is slightly nearer in taste to the sherry than it is to the sake, because both have a more or less vinous flavor.

Redirect examination by Mr. FITCH:

There is no resemblance between the Emperador sherry and the sake in taste, certainly not.

THOMAS F. MCTIGHE, witness for the importers, testified:

Direct examination:

Residence Honolulu; occupation wine and liquor merchant. I have been in business fifteen years. As a merchant I have a knowledge of the qualities and character of wines and of the liquors I deal in. I am acquainted with the different kinds of wines and sherries and sake. Comparing sake with the Emperador sherry in smell there is a great difference. There is no resemblance whatever in taste. Comparing sake with the Duff Gordon sherry in smell there is a big difference; comparing them in taste there is no resemblance whatever. Compared with the Jimenez & Lamothe sherry there is no resemblance in smell, none whatever in taste. I have known sake since it first came into the market. I do not deal in sake, but the firm that I was employed by before I started in business for myself imported it.

I testified yesterday on cross-examination that I had not protested on any sake. I wish to correct my testimony. I found out after I went out—I went down and asked my bookkeeper and he said he had made a protest, some time in April, 1905, on fifty tubs. That is all.

92 Cross-examination:

Burgundy resembles in taste the Jimenez & Lamothe sherry. There is no comparison at all with the sake. Taking general characteristics, that is, color, taste, odor, alcoholic strength, and any other characteristics and comparing the Jimenez & Lamothe sherry with the Burgundy, and also with the sake, I consider they are entirely different from sake. Considering all the characteristics, if I had three glasses, Jimenez & Lamothe, sake and Burgundy, I would certainly consider that the Jimenez & Lamothe was more similar to the Burgundy than it was to the sake. I can tell that the Jimenez & Lamothe and the burgundy are made from the grape; they have a grapey taste. The Jimenez & Lamothe resemble this sample of claret more than it does the sake.

Q. If you were handed a beverage how could you tell whether it was wine or whether it was sake?

A. If it was wine I would drink it; if it was sake I would throw it at you.

J. H. HERTSCHE, witness for the importers, testified:

Direct examination:

I reside in Honolulu. My occupation is Manager of the Moana Hotel. I have been engaged in the occupation of hotel manager four years. I have had occasion at times as hotel manager to acquaint myself with the taste and character of wines and liquors. I think I can tell the difference between wines and liquors. I have tasted sake. I cannot find any resemblance in taste between sake and the Emperador or the Duff Gordon sherries. I find a similarity
93 in smell. If you don't use the sense of smell there is no similarity between sake and the sherry wines. If you do use

it there is a slight resemblance, especially between sake and the Jimenez & Lamothe sherry. That is the way it affects me. I have never handled Jimenez & Lamothe sherry. I have never heard of it before. I am not positive that it is sherry. I don't think it is pure wine. I don't know whether it is wine at all.

Cross-examination:

I have had occasion to taste wines in a business sense—regular business to taste wines—during the last five years. When we get new brands I test them by comparison. We handle port, sherry, French and Rhine wines. Outside of my hotel experience there was a time when I bought considerable wine for my own use not in a business way. I am not interested in any protests on sake. I have never been connected with any house that is. I find no similarity in taste between the Jimenez & Lamothe sherry and the sake. There is more difference between the Jimenez & Lamothe sherry and the Burgundy, than there is between the sherry and the sake. It don't taste like sherry; I don't know what it is. (Tastes and smells). Having tasted the Duff Gordon sherry, I find no silimarity between that and sake, either in color, taste, alcoholic strength or odor or general characteristics. If you leave out smell there is a great similarity between the Duff Gordon and the Burgundy. Considering all characteristics, including color, alcoholic strength, taste and odor, I consider that the Duff Gordon sherry is closer to the Burgundy than to the sake.

94 I am familiar with beers. The sake has more alcohol than beer. As far as taste is concerned I think it is similar to beer; when it comes to smell, not. Sake is more similar to beer in general characteristics, I mean including smell, taste, absence of carbonic acid gas, color, etc., than it is to Jimenez & Lamothe wine. There is more similarity between that Jimenez & Lamothe sherry and sake than there is between the other two sherries and sake. I find more similarity between the Jimenez & Lamothe sherry and sake than between the Jimenez & Lamothe sherry and the Emperador sherry. The two other sherries are closer than the sake. I don't think I have ever handled sherry as dry as the Duff Gordon or the Jimenez & Lamothe.

M. KISHI, witness for the importers, testified:

Direct examination:

I reside in Honolulu. I am manager of the Yokohama Specie Bank. I am familiar with the Japanese liquor called sake. I use it and have used it all my life. I know the habits and customs of my countrymen with respect to drinking it. In taking it they usually warm it first, and sometimes take it cold. They use a small cup to drink it. The number of cups they take at a sitting at dinner depends upon the capacity of the drinker. I could not say the number of these cups that would be drunk at one time. They would use a small bottle and make it warm and small cups are used for each one. The ordinary bottle used would hold ten or twelve cups; a

pint bottle. Some of the lower order of laborers, the common
95 people would drink one bottle, some two bottles. The Emperador sherry is quite different in taste and smell from sake. The Duff Gordon, the Jimenez & Lamothe, the Burgundy, the Claret and the Riesling are different in taste and smell from sake. I am not an expert used to drinking wine. I can detect the difference between the taste of different wines as compared each one with another wine.

(Witness conceded not to be a wine expert.)

T. SUMIDA, a witness for the importers, testified:

Direct examination:

I reside at Honolulu. Occupation, dealer in liquors. In business for myself. I am familiar with sake and have bought and sold it, and used it. This (Exhibit 2) is sake. This (Exhibit 3) is wine. It does not in smell resemble sake. It is different. It does not in taste resemble sake. The Jimenez & Lamothe is different in taste and smell from sake. I deal in wines and liquors as well as sake. I am familiar with the taste of both imported and California wines. My countrymen generally warm sake and drink it. I am very fond of sake myself. I could consume two quart bottles. Some of my countrymen generally drink only one or two cups, while others consume one gallon even. I deal in sake. Sake will keep or spoil according to the quality. Some is only good for two or three months, while others might stand for one year without spoiling.

Cross-examination:

I have protests pending on sake. Have been filing protests for the past 20 months, ever since I have imported sake.

96 I handle about three kinds of imported wines and six or seven kinds of domestic wines and about six kinds of beers. I find no resemblance between Burgundy and sake at all. There is some resemblance between that Burgundy and the Jimenez & Lamothe sherry. There is more resemblance between the Burgundy and the sherry than there is between the sherry and the sake. Between the sherry and the sake there is no resemblance at all. There is no resemblance between the Claret and sake. So far as I am able to tell there is more resemblance between the sherry and the claret than there is between the sherry and the sake. As to the color (examining contents of glass) if you say darkness is near, the sherry is nearer to Burgundy but sake is nearer to sherry as the two have a golden hue. As to the odor, (smelling contents of glasses) there is very much resemblance between the sherry and the Burgundy, but there is no similarity at all with the sake and sherry.

T. IWANAGA, witness for importers, testified:

Direct examination:

I reside in Honolulu. I am a wholesale dealer in wines and liquors, and sake. I am familiar with the taste and qualities of sake.

I use it. Compared with the Emperador sherry, sake in smell is entirely different. The taste is also different. Compared with the Duff Gordon sherry the smell is different, the taste is also different. Compared with the Jimenez & Lamothe sherry it is different both in smell and taste. The Japanese drink sake warm. The quantities consumed all depends upon the person who drinks. Some may
97 drink one or two bottles while others may drink a gallon. The length of time that sake will keep without spoiling depends upon the quality—say from three or four months to about one year.

Cross-examination:

I have protests pending on sake for the past four years. I have been protesting for the firm of S. Komora & Company, Limited.

(Counsel for importers declared the witness not qualified as a wine expert.)

S. KOJIMA, witness for the importers, testified:

Direct examination:

Residence Honolulu. Occupation dealer in wines, liquors, sake etc. Sake has a different smell from the Emperador sherry. In point of smell it is different from the Duff Gordon. Both are of different taste. It is of different taste and smell from the Jimenez & Lamothe. In using sake the general habit of my countrymen is to drink it warm, in quantities from one bottle to three bottles, more or less. About this size (indicating a quart bottle). Sake when kept in a tub will stand good three or four months, but in a bottle seven, eight or ten months.

Cross-examination:

Q. Examine this sample of Burgundy.

By Mr. FITCH:

I object on the ground that the witness is not qualified as a wine expert; just simply testified as to sake.

I have protests on sake pending before the Board. I have been filing protests against sake three or four years.
98 In Japan generally they use sake warm; of course sometimes they use it cold. In Honolulu they generally drink it warm but on the outside plantations I do not know. Some people are satisfied with a glass or two. Some with one or two cups or less.

K. ODO, witness for importers, testified:

Direct examination:

Residence Honolulu. Occupation dealer in general merchandise, also wines and liquors and sake. I am familiar with sake and have bought and sold it. I have used it myself. I am familiar with the manner in which it is used by my countrymen. There is no com-

parison in smell between sake and the Emperador sherry; different smell and different taste. Comparing the Duff Gordon sherry with sake both taste and smell are different. Compared with the Jimenez & Lamothe sherry both taste and smell are different. My countrymen generally use sake warm, but some people drink it cold. The quantity consumed is purely dependent upon the person. If a person does not like alcohol or liquor just one taste is enough for him, while others might consume one gallon. Of course to consume one gallon takes time. Sake kept in tubs is good for three or four months, sometimes six months. Supposing any break where the air gets inside then the thing will spoil right away.

Cross-examination:

Q. Examine this sample, Burgundy.

By Mr. FITCH:

I object on the ground that the witness is not qualified as a wine expert.

I have protests pending on sake for the last four years.

99 G. NAKAMURA, witness for the importers, testified:

Direct examination:

I reside in Honolulu. Occupation clerk in the banking house of Bishop & Company. I am more or less familiar with the characteristics of sake—with its taste and odor. I have sometimes been in the habit of using it. The taste and smell of the Emperador, the Duff Gordon and the Jimenez & Lamothe sherries are different from sake. It is generally warmed up by my countrymen before being drunk. Some drink one bottle while others take half bottle, and others take three or four bottles.

(It is stated by counsel for the importers that the witness is not produced as an expert wine taster).

Cross-examination:

Some people take half a bottle, some just take a cup and some take three or four bottles at one time. I have no protests filed against the importation of sake. I do not import it. I was never in the business. I have no interest in the result of this action. Some people drink sake cold and some drink it warm. Generally warm.

T. MURAKAMI, witness for the importers, testified:

Direct examination:

I reside in Honolulu. Dealer in general merchandise and provisions. I am familiar with sake its general characteristics, smell and know the taste of it. I have used it for 20 years. There is no similarity in taste or smell between sake and the Emperador, the
100 Duff Gordon or the Jimenez & Lamothe sherries. My countrymen generally use sake warm. Some drink one bottle and

some less while others drink three or four bottles. I am not an importer of sake and have no interest in the result of this action.

(Counsel for importers states that witness is not produced as an expert wine taster.)

Cross-examination:

Some people only take a cup of sake when they drink and some people use it cold.

I never filed any protests on sake.

J. OSHIMA, witness for the importers, testified:

Direct examination:

Reside in Honolulu. Business general merchandise. Familiar with sake its characteristics taste and smell, and have used it for 35 years. Compared with the Emperador, the Duff Gordon or the Jimenez & Lamothe sherries there is no similarity whatever in taste or smell. My countrymen generally drink sake warm. Some people drink more while others drink less, but a man who is supposed to drink sake habitually takes from one to two bottles. I have no interest in the result of this action. I have filed no protests; I was never connected with any house that had protests on sake. I have no interest whatever in the result of this action.

Witness not produced as an expert wine taster.

M. KAWAHARA, witness for the importers, testified:

Direct examination:

101 I reside in Honolulu. Business, general merchandise and provisions. I am acquainted with sake and have used it myself for 14 or 15 years. I am familiar with its characteristics, taste and odor. Compared with the Emperador, the Duff Gordon or the Jimenez & Lamothe sherries sake is different as to taste and smell. Those who use sake generally use warm sake. Some people take only one cup, while others take three or four bottles. I have never filed any sake protests for myself or others. I have no interest in the result of this action.

(Witness conceded not produced as an expert wine taster.)

Cross-examination:

A good many drink sake cold.

S. B. FUJIYAMA, witness for the importers, testified:

Direct examination:

Reside in Honolulu; business, dealer in general merchandise. I am familiar with sake its characteristics, taste and smell and have used it about 12 years. Compared in taste and smell with the Emperador, the Duff Gordon and the Jimenez & Lamothe sherries sake is different. My countrymen drink sake warm. Some people drink

only one cup while others drink three or four bottles. I have entered no protests with respect to sake. I have no interest whatever in the result of this action.

(Witness not produced as an expert wine taster.)

Cross-examination:

Many drink sake cold.

102 The Government introduced as evidence the following:

Evidence Taken Before the Board in Komada Case.

Mr. A. S. PERSH, witness for the Government, testified:

Direct examination:

I am a United States Japanese interpreter and familiar with the language.

The word "Sake" came into Japan about 400 years ago, originally from China into Southern Korea, thence into Southern Japan and then became general throughout the Islands. The word originally meant a ceremony of drinking, but as there was formally only one drink general in Japan the word by usage came to denote an intoxicating liquor. From its introduction until now the word has been used to denote generally wine or any intoxicating liquor. There is, for example, no Japanese word for whisky (there is a modern one for beer) and one using that intoxicant is referred to as a man who uses sake, the old-fashioned word being still employed. The modern word for beer is "Beru" and was adopted when the first brewery was built in Japan.

Amongst the lower classes sake is generally drunk warm but sometimes cold, sometimes in large cups and sometimes in smaller ones. In hotels the proprietors will ask if it is wanted hot or cold, and they serve it to foreigners in larger glasses than to Japanese. I think the prevailing custom is to ask foreigners if they wish it cold as I think they usually prefer it so. Some Japanese do also, but I
103 cannot state what per cent. It is drunk in quantities from one-half a whisky glass to one-half a tumbler. I am familiar with the use of regular beer in Japan. That drink is taken very often in medium sized tumblers.

(No cross-examination.)

ALBERT SCHNEIDER, witness for the Government, testified:

Direct examination:

I am a teacher of botany and related sciences at the California College of Pharmacy, and am somewhat familiar with "Sake" as manufactured here in Berkeley. I have made three visits to the factory and am fairly familiar with the process of manufacture there. I have also looked up other information regarding its manufacture in Japan and other countries. I have made a study of yeast and fer-

ments to a certain extent. From the material obtained at the brewery in Berkeley I have made a study of the ferment used in making sake. I have also made a study of ferments used in making lager beer, incidently, but have not made them a special study.

There are two ferments employed in the manufacture of sake; the first ferment is liberated by an organism fungus known as aspergillus oryzae, which means the aspergillus or fungus of rice. In the manufacture of sake in this country this organism is generally imported from Japan, and added to the steamed rice by the manufacturer. The ferment is closely similar to the diastase normally present in the majority of cereals like barley, wheat, corn and others.

It converts the starchy substance of the steamed rice into sac-
104 charine substances which are in turn acted on by the alcohol ferment—the second ferment referred to. In the case of sake this alcohol ferment is closely similar to the organism which causes alcohol fermentation in beer and related drinks.

According to most recent testimony regarding the similarity between the diastase of sake and the diastase of beer, there are a number of ferments closely similar, in that they produce similar changes in the starchy substances, viz:—convert them into saccharine substances. The essential difference is that in barley used in beer the ferment or diastase is unorganized, that is, formed out of a dead substance; whereas in sake the diastase is an organized ferment formed by a living organism, the aspergillus oryzae just referred to. The effects produced are closely similar.

The yeasts used to convert the sugar into alcohol in sake, in beer and in wine are closely similar. The leading authorities have for a time been disputing just exactly how closely similar they are, but they all belong to one class or group of organisms known as saccharomyces, which roughly translated means sugar fungus; that is the fungus which converts sugar into alcohol. Structurally they are very closely similar, that is they are cellular, consisting of cells having a different form and size and a different method of reproducing or propagating.

This sake yeast acts on this rice which has been steamed and acted on by the aspergillus already referred to, and produces all the way from a possible minimum of 13 per cent up to a possible maximum of 19 per cent. of alcohol.

105 Some wines as well as porter and ale are drunk hot.

I have prepared a paper on the manufacture and use of sake and have investigated the similarity of sake to wines and beers.

In alcohol strength there is a close similarity between sake and wine. The alcohol strength of sake varies between a possible low limit of 13 per cent (although rarely as low as that), and a possible maximum limit of 19 per cent. The great majority of authorities maintain that it never exceeds 18 per cent and very rarely falls below 14 or 16 per cent alcohol strength. The alcoholic strength in different wines varies considerably, but is approximately the same as that of sake.

Sake is without any bead or head; it doesn't foam and it resembles so-called still wines closely. Sparkling wines don't resemble sake

wine in that respect as they contain carbonic acid gas which is wanting in sake. In sake fermentation is completed; I don't know that sake is ever charged with carbonic acid gas as in the case of champagne.

As to the odor and taste and other properties it is wine like rather than beer. It has a very peculiar bouquet or flavor as it is called, which according to some is to be compared to bad champagne, or champagne from which carbonic acid gas has escaped. Others refer to the flavor as simply peculiar to that particular drink. As to the use of sake, as a rule it is taken hot, but not always. Some wines are taken hot, but not as a rule.

There is a close similarity in their effect upon the system, excepting that sake produces a more rapidly evanescent form of intoxication, very likely due in part to custom of heating sake, causing the alcohol to become rapidly volatilized and rapidly absorbed into the system. Volatilizing rapidly it escapes from the system rapidly and hence that peculiar form of intoxication; a brief period of intoxication.

106

As to the taste of sake as compared to wines, or more particularly as to whether the taste is acid or not, it has a decided wine-like taste, wine-like acidity and wine-like alcohol taste also, with the addition of that peculiar bouquet or flavor characteristic of sake, just as every wine has a characteristic flavor.

Cross-examination by Mr. FITCH:

Carbonic acid gas is always produced by certain forms of alcoholic fermentation. It is produced in wine the same as in beer and sake. The absence of effervescence in a liquid is due to allowing the carbonic acid gas to escape or by the expulsion of the carbonic acid gas. There is no carbonic acid gas in still wine. I don't know whether it is completely absent or not but it is sufficiently absent to prevent effervescence. In the manufacture of sake the carbonic acid gas is allowed to escape by the sake standing in open vats. As far as my knowledge goes in the matter of champagne, the carbonic acid gas is added, pumped into the wine, but in many alcoholic drinks like beer, etc., the carbonic acid gas is liberated by the yeast ferment of beer and the escaping gas is held within an enclosed space and prevented from escaping entirely.

There are still beers which are not usually considered fit to drink. The method of the manufacture of ale is closely similar to the same process of making beer. The quality of effervescence in wine or a beer is produced by the prominence in wine or beer of carbonic acid gas. The carbonic acid gas existing in wine or beer is produced either by alcoholic fermentation or by being artificially placed in wine or beer afterwards. If the carbonic acid gas in the manufacture of sake, wine or beer is expelled or allowed to escape, the wine, the sake or the beer would be still unless carbonic acid gas was subsequently injected.

107

Redirect examination:

Comparing sake and beer, in the manufacture of sake quite generally, but not always perhaps, carefully steamed rice forms the

base of the material. In the manufacture of beer barley is quite generally used. As regards the first process after the rice has been steamed it is exposed to the fungus aspergillus oryzæ. The alcoholic strength of beers is always much lower than that of sake, being usually 3 or 4 per cent. Good beer is always effervescent as far as I know, whereas sake is not. Beer is taken in large quantities comparatively speaking and sake is taken in small quantities. Beer as a rule is not heated, although it is the custom on the part of some drinkers to plunge a red hot poker into the beer before drinking it, and sake is quite generally heated, especially as consumed by the native Japanese, but not always. As to intoxication, beer produces intoxication if taken in very large quantities, although some authorities, mostly German I think, maintain it is not intoxicating at all; whereas sake produces a very rapid evanescent form of intoxication.

There is three or four per cent of alcohol in beer; sometimes it runs higher than that in porters if you class them with beer. I don't know exactly what per cent; it seems to me five or six.

108 WILLIAM WENZEL, witness for the Government, being duly sworn, testified:

Direct examination:

I am a chemist in the custom house department, and I have done a good deal of analyzing work at different times. I am familiar with sake and have analyzed and tasted it. I am familiar with the manufacture and use of beers. I have looked at the processes of making sake in Berkeley, and studied them analytically more or less. I have also studied the imported sake analytically. The two products are chemically identical.

As near as I can remember—my memory is not as good as it ought to be—the first step in the manufacture of sake is the steaming of rice, by exposing previously cleaned rice in a large tub and passing steam through it. This tends to soften the rice grains, to swell them and also liberate the starch. The next step is to prepare what the Japanese call Moyashi. This is accomplished by exposing the steamed rice to the action of the open air for about seven days. The object of that is to receive upon the surface of the grains of rice the spohrs of an organism called the aspergillus oryzæ, (in other words, the aspergillus of starch) and also the spohrs of what is called wild yeast, which causes sugar to ferment; these spohrs are floating in the atmosphere and will also deposit upon the steamed rice. A quantity of the steamed rice is then exposed in shallow trays in a room artificially heated so as to bring it up to a temperature best adapted to cause the spohrs of the aspergillus to
109 germinate. This usually requires about 7 days. At the expiration of that time the rice has become covered with a greenish mould. This mould is a plant which is formed by the germination of the spohrs of the aspergillus, and is called Koji. It is the ferment of sake. This ferment is then mixed with a certain quantity of steamed rice and water and placed into the tun in which

the fermentation is to be started. To this mixture in the vat are added from time to time additional mixtures of boiled rice, Koji and water in certain proportions, until the vat is filled high enough to start the fermentation. The mixture now contained in the vat is called Moto. The fermentation now begins in the usual way, influenced, of course, by the temperature of the mixture, which is from 62 to 68° Fahrenheit. It takes from 20 to 30 days to complete the fermentation.

I have made a comparison of sake with wines and beers principally by comparing the analysis of the two, and also by comparing their principal points after the sake was completed in its commercial state. I find that the beer made in San Francisco has an alcohol strength of 3.8 per cent, and that of sake from 16 to 18 per cent.

I have not examined any wines, but have examined or compared sake with wine as to its taste. I would say that sake is nearer to wine than to the beer in taste. Sake contains no carbonic acid gas, whereas beer does. Beer effervescences while sake does not.

As a chemist I would define "spirituous beverage" to be any beverage containing alcohol. I would say that it was not necessary to add alcohol extrinsically.

110 CHARLES S. ASH, witness for the Government, testified:

Direct examination:

I am Assistant Superintendent and chemist of the California Wine Association and am familiar with the production of wines and the article known as sake. I have been in the wine business ten years. I have compared sake with other wines. The similarity I find first is the percentage of alcohol being very similar, the absence of carbonic acid gas, the color, the taste. In color it is very similar to white wine. It is like an unfinished sherry, or sherry material in taste.

I disagree with the testimony of Doctor Herman Endemann, where he says that in wines there is always contained succinic acid, but not lactic acid. All alcoholic fermentations do contain succinic acid and also lactic acid. I also disagree with his statement that wines are always fermented in the absence of air, in closed casks from which the air is carefully excluded. Most white wines and all red wines are fermented in open casks, the casks being almost full, but not entirely. This excludes all the air, as the carbon dioxide, which arises from the fermenting vats, being heavier than the air, settles down over it and thus excludes all air. It would be impossible to ferment red wines by inserting a tube into the bung hole of a closed cask and letting the end of the tube dip into water, as Dr. Endemann stated. On account of the skins clogging the tube and leaving no escape for the carbon dioxide it would eventually blow up the casks.

I disagree with his statement that fruits and fruit juices contain only a very small quantity of peptones and that the highest
111 limit of peptones in the entire substance of wine is twenty-nine hundredths of one per cent., and as a general thing less

than one-tenth of one per cent. It usually runs about two-tenths of one per cent., in some cases as high as five-tenths, and in isolated cases nine-tenths.

I never heard of the book of J. Dumas referred to by Dr. Endemann.

I disagree with Dr. Endemann's statement that still wines vary considerably, some containing over five and one-half times as much alcohol as other wines. The minimum amount of alcohol in any still wine I ever saw was about 8 per cent. and in still wine that has not been fortified the highest I ever saw was 15 per cent; 99 per cent. of all the wines would run between 10 to 14 per cent. of alcohol by volume.

I am familiar with spirituous beverages and consider a spirituous beverage any beverage that contains the spirits of alcohol. I know some spirituous beverages to which alcohol is not added, namely, wine, beer and sake.

The term "quality" as used in speaking of wine means grade of excellence in reference to them.

Cross-examination.

By Mr. JACKSON:

There is no similarity in the material out of which sake is made and the material out of which wine is made. Wine and sake taste fairly the same; a slight difference, very much like sherry material as I said. The taste and color are very similar. In tasting it is very similar to wine. Unfinished sherry is sherry that has not been baked. Baking is the process of heating sherry in an oven until it becomes sherry. All sherry is baked.

112 Redirect examination:

There is such a thing in the wine business as a cultivated taste for wine. In a drinker of wine the taste is cultivated as in a tea taster. I mean to say there is such a thing as a wine taster. The taste is cultivated to a higher or less degree depending on the individual.

PERCY T. MORGAN, witness for the Government, testified:

Direct examination:

I am President of the California Wine Association, and am as familiar with all branches of the business as ten years' close application might make me. I have seen the article known as Japanese sake and compared it with wines to ascertain its similarity and dissimilarity. I find that the finished product sake is similar to wine in that it contains no effervescent qualities, it is clear and has a color similar to some wine and is classed as I understand as a wine. Its taste is similar to some kinds of wine; I mean to say it resembles it more than any other product I know of.

The usual alcoholic strength of wine is from 7 to 15 per cent, very unusually 15 per cent, and generally in California from 10 to 13½ per cent. I am familiar with spirituous beverages generally; a

spirituous beverage is anything that contains alcohol. It is not necessary in order to constitute a spirituous beverage that the spirits should be added.

Cross-examination.

By Mr. JACKSON:

Sake in my opinion is more like wine than anything else. California dry wines are produced by fermentation; sweet wines
113 and sherries by arresting the fermentation by the addition of spirits and the increase of alcoholic contents thereby. California wines are made out of grapes. They are first picked and crushed by hand power or by mechanical power, taken to the fermentation vats, there fermented; in the case of red wines, generally with the skins; in the case of white wines, drawn off from the skins and fermented separately. I am not familiar with the method of making sake except by reading. Sake does not look as much like beer as like wine. So far as my understanding is concerned, sherry is either baked in an oven, or by the heat of the sun, or some process other than natural.

C. SCHILLING, witness for the Government, testified:

Direct examination:

My business is California wines and brandies; I have been in the business 34 years. During that time I have become thoroughly familiar with California wines and with their manufacture and various characteristics. I have seen and tasted sake, which convinces me that it is something like what is called here in California sherry material.

The percentage of alcohol in wines, both sweet and sour, both California and others is all the way from 6½ or 7 to 15 per cent for dry wines and about 20 per cent. for sweets.

In the absence of carbonic acid gas sake is similar to wine.

114 Cross-examination by Mr. JACKSON:

Sake is a crude article the same as sherry material. Sherry material is the rough material which is afterwards made into wine by baking process,—heating it for a length of time. All sweet wines, as I understand, are made by fortification.

P. C. ROSSI, witness for the Government, testified:

Direct examination:

I am President of the Italian Swiss colony whose business is the production of grapes and manufacture of wines and brandies. I have been in the wine business since 1881. I have become familiar with the various grades of wines and their process of manufacture, appearance, characteristics, etc. I am familiar with Japanese sake and have had occasion to examine it several times. I have examined it for the alcohol test. The similarity I find between sake and sherry material, which is the nearest of wines to sake, is that both

have about the same color, about the same taste and about the same alcoholic strength, and they are both still in so far as they do not contain carbonic acid gas. I consider sherry material is a wine. It is so considered in the trade. Sherry material is the term used only by dealers, not by the trade generally, but the dealers recognize the fact that sherry material is not a finished wine.

Generally red wines are served lukewarm.

I am familiar with spirituous beverages and consider a spirituous beverage anything that contains alcohol. It does not matter
115 whether it is added or produced alcohol. I would say that sake is a spirituous beverage. There are some spirituous beverages to which alcohol is added; it is added to cordials except in the case of vermouth.

In order to make sherry material a complete wine it must be baked, put in casks where the temperature is kept to a certain degree and where the natural heat or artificial heat gives it that sherry flavor. It is considered a merchantable article depending on what purposes it is to be used for; for instance some manufacturing chemists buy sherry material as it is, and make medicinal preparations out of it.

Cross-examination by Mr. JACKSON:

Q. You have not sold it as a beverage, however?

A. Well, we have sold it as a sherry material; if they buy it and blend it with other wines and preparations, of course it is none of our affairs, but generally speaking those who purchase it do so for manufacturing purposes.

ARTHUR LACHMAN, witness for the Government, testified:

Direct examination:

I am, and have been for about seven years, a consulting chemist in the wine line. I am familiar with the process of manufacture of wines, and with the characteristics of wine generally. My only familiarity with sake is from an examination of the sample made yesterday afternoon, when I tasted it. I have compared that with wines only from the standpoint of the senses. I have not
116 made any chemical analysis. Sake resembles wine in its color and taste. It resembles neither wine nor beer in odor, meaning by wine the common article prepared from the grape. A great many wines have different odors, depending on the material from which they are made. A great many wines are prepared from fruits of various kinds, also from cereals. Wine made from rice, which is possibly identical with the article in question, sake, is known as rice wine. I also had occasion, over a year ago, to taste a sample wine manufactured from barley, by a brewer named Balentine.

In the course of my business it has become necessary for me to become familiar with the articles in commerce known as wines. I was for ten or twelve years familiar with the term wines as used in the trade in this country prior to 1897. I think, as the term wines was used prior to 1897, the term is broad enough as understood in trade and commerce to include wines made out of other materials than grapes.

I am familiar with the substance known as sherry material. In my trade it has always been considered a wine and was so considered prior to 1897. The purpose of baking a sherry is to hasten the process of ripening that particular flavor. Sherry material will acquire the true sherry flavor in the course of time, but the baking process brings about in a few months what otherwise takes several years.

Sake resembles most nearly a strong white wine, in which class the sherry material belongs; a wine that is strong in alcohol and in which the alcohol flavor predominates over all other flavors.

117 The question as to the presence of lactic acid is difficult to answer in detail, because of the fact that it is estimated differently, and the test has not often been made. Most wines tested for lactic acid will vary in amount from case to case, but average perhaps five one hundredths of one per cent.

I regard a spirituous beverage any beverage that contains alcohol. It is immaterial whether alcohol be formed in the liquid naturally or whether it be added subsequently. My acquaintance with beverages outside of wines and beers is very limited.

Cross-examination:

The first time I ever saw sake was yesterday. I made no chemical analysis of it. Sake tastes more like wine than like beer because it contains much more alcohol to the taste, being approximately the quantity contained in strong white wine; also because it lacks carbonic acid gas always present in normal beer; also because it contains a marked amount of acid to the taste which is lacking in beer. A beer or champagne if exposed long enough in the air would be without gas; the carbonic acid gas would escape if given an opportunity. Wine does not contain maltose, ordinarily. Malt wine is barley wine to which I referred. Maltose is a special kind of sugar discharged from the fruits, a product of fermentation, the same as common alcohol is obtained from the sugar in fruits. The fact that the alcohol which sake contains comes from maltose is a point of differentiation between that and grape wine. Tartaric, malic and succinic acids are acids found in wine. It is very difficult to tell whether there is any lactic acid in wine or not.

118 FERDINAND FROHMAN, witness for the Government, testified:

Direct examination:

I am manager of the Sales Department of the California Wine Association, and have been connected with this business since 1879. I have become familiar with the manufacture and characteristics of the different kinds of wines. I am familiar with the Japanese sake and have examined and tasted it. It is similar to wine in its general appearance, which includes color, its taste, its alcoholic content, its absence from carbonic acid gas, and its tendency to intoxicate. I consider a spirituous beverage any drink that contains alcohol. The term would cover an alcoholic drink whether the alcohol was present intrinsically or had been added.

Cross-examination by Mr. JACKSON:

Sake is very much lighter than any beer I have ever seen or tasted; that is in color. It is about the same color as ale. It is not like beer in my opinion. In its general characteristics it is like some wines, that is, very similar to a wine that is used for making sherry before it is heated, sherry material. I never knew grape juice to be malted. The term "malted" is never used in its manufacture:

JOHN T. DARE, witness for the Government, testified:

Direct examination:

I am the United States appraiser at San Francisco. I identify a bottle marked Japanese sake which was imported from Japan
119 in the regular way. It was taken out of the case in my presence in the public stores. The invoice covering that merchandise described the article as sake. I identify the outer wrapper which I took off the bottle when I took it out of the case, and which reads as follows:

"The 'Nichibei' Wine is of best quality, brewed in the original "place of Nada, Setsu province, known as the principal brewing dis- "trict in Japan. It has not only a palatable taste, but also a sweet "fragrance. The wine is brewed according to modern plans now "adopted in America and Europe, after having gone through practi- "cal experiments for a number of years. It is entirely free from "any adulteration or mixture, keeping always in perfect condition, "by which it has gained a wide reputation as a wholesome beverage "at the moment when severe panic had taken place among other "brewers, owing to the enforcement of the Antiseptic Controlling "Law; and the public is therefore recommended to make a trial of "same.

"YAGI SHOTEN."

Rice Wine is a common term; it is sometimes on the invoice as well as on the label on the bottle, but as a general thing it is called Japanese sake,—that is the term used more frequently than any other term.

I have never had occasion to make a note of how frequently the term rice wine is used on the bottle, but it is so very frequent we rather expect it when we handle a bottle of sake; therefore I would say in the majority of cases it is so marked, though I never had occasion to notice particularly.

Counsel for the importers move to strike out all the evidence
120 as to the similarity in taste between sake and wine on the ground that it is immaterial, irrelevant, incompetent; that it calls for the opinion of the witness; that it is not proper for expert testimony, and also on the ground that the testimony is not as to the similarity to a wine, but to sherry material which is not a wine.

(Motion denied. Exception.)

HENRY F. WINDLER, witness for the Government, testified:

Direct examination:

I am and have been for six years brewmaster of the Enterprise Brewing Co., in San Francisco. I have been in the beer business all my life and am familiar with Japanese sake. I know it from its taste and color.

The difference between sake and beer is in its taste and smell. It contains no carbonic acid gas, and it has the same color as some beers. It seems to me that sake has much more alcohol from the way it tastes than beer, considerably more alcohol. The percentage of alcohol in beers varies from 2½ to 5 and 6 per cent. alcohol. In the brewing of beer hops are always used. Beer has more or less of a sharp taste due to the carbonic acid gas, also a malt flavor, or a hop flavor.

Q. Now as to sake what is the taste of that?

A. I would state, as far as sake is concerned, I could not say, only that it might resemble the taste of wine more than anything else that I know of. I find no points of similarity whatever between sake and beer.

121 Cross-examination by Mr. JACKSON:

Gas is eliminated from beer partly when the beer is exposed and partly by itself, also by heat or by agitation and different methods.

JULIUS A. HIERONIMUS, witness for the Government, testified:

Direct examination:

I am brewmaster of the Wunder Brewery, and have been connected with the business of brewing beer almost 20 years. I am thoroughly familiar with the process of manufacture and the general characteristics of beer after it is finished. I have not examined sake except that I have tasted it and examined its characteristics after completion. I have compared its taste and appearance with beers. I find no similarity between beer and sake. The characteristics of beer are principally the taste, the color, clearness, the brilliancy of the product and its capacity for holding a foam or head, and the carbonic acid gas which forms the foam.

The average American beers will average perhaps 2½ per cent to 5 per cent, possibly some as high as 6 per cent, though I never saw any in my experience. I cannot say that there is much taste of sake in beer; they are very dissimilar, not at all alike and it would be pretty hard to tell just what the difference is. Beer has the flavor of malt, also of hops, and the freshness of carbonic acid gas also helps to flavor it, which is entirely lacking in sake.

122 Cross-examination by Mr. JACKSON:

The original process of making beer starts with the malting. The raw barley is placed in tanks, soaked to soften it and to start the malt to growing. It takes roots, and the acrospire, the life under the hull of the barley, begins to start up toward the other end of the

grain. The malting process develops the diastase. After the growth has proceeded for about three-fourths of the length of the grain to the full length of the grain, the proper amount of diastase has been developed, and the growth is then stopped by kiln drying that abstracts the moisture, and stops the growth, and develops the kernel of the barley into a fuller kernel. This is then crushed and mixed with water at the proper temperature so as to properly develop the starch and finally change the starch into dextrines and maltose. In most processes a certain amount of albumen matter is extracted, which is very essential to beer.

After the mashing has been completed and the conversion of the starch into dextrines and maltose has taken place the beer is drawn off as a perfectly clear liquid. From there it is drawn into the boiling kettle, in which the hops are added. The hops are divided up. The first part of the hops are added early in the boiling, so as to get the bitter taste. The finer grades of hops, which are very often European Bohemian hops, are added toward the last to bring out the fine hop aroma and fine hop flavor. After the hopping of the beer, it is cooled to a low temperature, and the yeast is added. This is very often pure cultures. From there the fermentation starts, and takes from ten to fourteen days. Then the beer is placed on the
123 Rhu or storage while aging. From the storage tanks it is removed to the clarifying tanks in which the beer is again given life by the addition of a small amount of newly fermenting beer; that is, beer that has had the yeast added to it, and has come into a high state of fermentation. This newly added beer distributes carbonic acid gas throughout the beer, and gets it into a lively condition which is absolutely necessary to make a marketable product. After the beer has been in these tanks long enough to allow the new beer to thoroughly ferment and diffuse its gas through the other beer and become perfectly clear, it is drawn off into shipping packages or beer kegs as finished beer. The new beer is put in to increase carbonic acid gas. There is not any tartaric acid present in beers. There is lactic acid in beers; in some breweries more than others, according to the malt they have and the malting process. There is a yeast added in brewing beer to increase fermentation.

Redirect examination:

In the barley there is a very little diastase but it could not be used in the brewing industry by itself. The barley first has to be malted to develop the diastase by growing in the barley itself until it has become strong enough to change the starch into dextrines and sugars.

Recross-examination:

When beer is being brewed it is not susceptible to taking any wild yeasts that are in the air. The subject of wild yeast in the air in a brew house would be almost an impossibility. A brewery that would leave their brew-house in that condition would go out of business in a very short *it*me. Beers soon spoil.

124 JOHN B. OPPEL, witness for the Government, testified:

Direct examination:

I am a brewmaster in the Albany brewery. I have been connected with the brewing of beer all my life. I helped to make beer in Germany. I am familiar with the characteristics of beer, the finished product. Just a few moments ago I tasted sake for the first time; I never tasted it before. I have made a comparison between beer and sake, based on the examination I made since I came into the office here. The similarity I find between sake and beer is only in the point of taste. It tastes more like our steam beer on account of the acid, as it has more of an acid taste than the lager beer. It tastes to me as if it had two or three times more alcohol than our beers. I know of some beer which is still; English stock ale of which they make a good deal in this country is still, and porter is still.

Government's Evidence Taken Before the Court in Komada Case.

ALEXANDER D. SHAW, witness for the Government, testified:

Direct examination:

I have been connected with the wine trade for about forty-five years. I am familiar with the manufacture of wines and I have dealt in them. I deal in wines from different countries and by comparison I know something of their different qualities. I have sometimes tested wines blindfolded. I have also had occasion to see a great
125 many of the American wines. I also handle brandies and Jamaica rums. I have observed abroad the making of wines to a certain extent. I have to judge wines continually in my business.

I know what sake is, although very slightly. I had occasion to examine sake previously, when I received a present of a case of sake from my son-in-law who brought it from Japan as a curiosity. When I got it I was curious to study it. I subsequently examined a sample of sake. I classed sake as being close to a low grade Spanish wine, grown in the South of Spain, a sample of which I had received only a short time before. I was quite surprised to find it resembled that class of Spanish wine so closely.

(Counsel for importers objects on ground that that wine was only a special importation. Objection overruled; exception.)

Sake has the color of a light, natural dry sherry. I found that sake resembles wine in its characteristics because it has the color and style of the low grade Spanish wine. It has also the flavor and character of that wine. Its alcoholic strength, although it seems somewhat low, is about the same as that of the same class of wine.

In December I received a sample of wine called Amontillado, same as Exhibit 3, from a firm in the south of Spain, advising me that they had a certain quantity for sale and telling me what the price was. They wanted to know if I wouldn't give them an order for they thought there could be a good market for it in this country. The

name of the house was Jimenez & Lamothe. The Jimenez & Lamothe is the class of wine I have been describing.

126 (Counsel for the importer objected to any testimony in regard to that wine until it was shown under what circumstances it was imported, claiming that it was a special importation and not a wine of general importation. Objection overruled.)

I ordered some of it from Jimenez & Lamothe. I have not handled that wine in a commercial way, but have handled that class of wines. I have no doubt at all that it is a true wine made from grapes.

(Counsel for the Government offered a bottle marked "Jimenez & Lamothe" Exhibit 3 in evidence, which was identified by witness as having been ordered by him.

Counsel for importers objected to the introduction of the bottle in evidence on the ground that it was a special importation. Objection overruled.

Bottle received in evidence and marked Exhibit 3.)

I find between sake and Exhibit 3 similarity in color, in flavor, in general character. They are very, very similar in taste. I couldn't tell you how they compare in alcoholic strength because that would be difficult to arrive at by taste alone. I have a wine that I import myself, a Duff Gordon sherry, which in my opinion is similar in characteristics to sake.

(Witness after tasting and smelling a glass, Duff Gordon sherry, continues:)

That is a sherry known as Manzanilla Solera shipped by the firm of Duff Gordon & Co. It is a brand of wine which is handled by my house right along. We keep it in stock and take orders for it very often. I am the agent for Duff Gordon & Co. in this country.

(Sample last produced received in evidence as Exhibit 4.)

127 Comparing the Duff Gordon sherry with sake, I find that the color of the two is somewhat similar and the aroma somewhat similar. In taste the sake is a little sweeter, but the general likeness exists, but not so markedly as between the sake and the Jimenez & Lamothe sherry. The Jimenez & Lamothe wine is closer to sake in its general characteristics than it is to the Duff Gordon sherry. My reason for that opinion is that the Duff Gordon wine is an older and higher class of wine. I do not know offhand of any wine except Jimenez & Lamothe which is closer to sake in its general characteristics than the Duff Gordon sample (Exhibit 4). I have not hunted for any.

Sake more closely resembles wine than it resembles anything else that I know of.

Cross-examination by Mr. CRANE:

The first time that I ever saw sake was in the early part of February of this year. I have tasted it on and off from that time as a matter of curiosity, simply to show my friends.

Q. Is your testimony as to any alleged similarities between sake

and wine based upon any other experience than the tasting of sake the few times you have mentioned?

A. Well, you can't say a few times because I suppose during that time that I have tasted it perhaps twenty times.

When I drink sherry it is not my custom to warm it before I drink it. I usually drink it at the temperature of the room. I imported the Jimenez & Lamothe wine, a sample of which is called Exhibit 3, at the request of Mr. Levett. That was the first time that
128 I ever imported that particular kind of wine and it was at his request. I first imported the wine Duff Gordon, sherry, over thirty years ago. Sake's taste is sweeter than the taste of this wine. That I cannot account for.

Wines are made from fruit juice. The term "wine" as used in trade is with reference to beverages made from the juice of fruits. That trade term would not necessarily exclude anything else. I should say sake is not readily distinguished from any wine by an expert. I do not distinguish it by its sweetness. That does not make any difference; that doesn't change the character because it happens to be a little sweeter. Another sherry would have just as much sweetness as that sake. If I should taste the two wines and sake again I would be able to tell which sake was because of its being sweeter than the other two. This importation Exhibit 3 Jimenez & Lamothe was a special importation made at the request of the Government. Sake resembles pale ales and Budweiser beer and so forth in color, as much as it does wine.

Re-direct examination:

The present up-to-date manner of making wines is to impress the grapes in a cistern, and the juice runs off into a trough; it is put into casks and the casks carted away and kept on storage.

JULIUS WILE, witness for the Government, testified as follows:

Direct examination:

I am an importer at New York of wines and spirits, bran-
129 dies, etc., representing 20 or more houses. I have been in the wine business continuously from 1866, and during that time I have become thoroughly familiar with different wines imported from various countries. I have had no experience in the manufacture of wines. I have never observed its making; I am simply an importer.

When a sample of sake was first submitted to me, I did not know and was not informed as to what it was. I carefully examined it, tasted it and smelt it, and then expressed the opinion that I thought it was a very poor wine. My reasons for so considering it were that I had recently received a sample of wine from Spain preceded by a letter offering me this wine. There was a remarkable resemblance. The wine here has a remarkable resemblance to this other article which I had received recently from Spain; I had it in my sample room and I got a sample and opened and showed it to the attorney, Mr. Levett, alongside of this sample of sake, and said, "This is a resemblance,

this is remarkably like this wine." I did not consider it a wine simply because I had received the sample from Spain. I said at once when I was asked what it was that I judged it to be a very poor wine. I said "I don't know what it is, but I should say it was a very poor wine." And then I remembered I have a sample here of a wine which I recently received from Spain which is very much like it."

I considered it a wine because in the first place I wouldn't call it a spirit; I wouldn't call it ale or beer. It is a beverage made of rice; and from my experience, my knowledge of wines, I could compare it most nearly to wine, to very poor wine of some kind. What
130 country it came from, what region, I couldn't tell. Without knowing or being able to tell what it was, I certainly would declare it, as I did, a wine. Jimenez & Lamothe is the house from which the sample that I had reference to came.

Q. Now I wish you to look at Duff-Gordon sherry, taste it, and state whether you find any similarity between that article and sake?

A. (Witness tasting sample.) Well there is a very remote—this is a pronounced type of Spanish wine. The Jimenez & Lamothe wine more closely resembles sake than it does the Duff-Gordon.

I think sake might be sold as a poor type of Spanish sherry; unless it came in the hands of an expert on sake, say Japanese, it would not be mistaken for anything but wine; that is my impression of it.

Cross-examination by Mr. CRANE:

The wine represented by Exhibit 3 came to me merely as a sample sent to my firm. I had not imported it before. The firm of Jimenez & Lamothe in Spain sent it to me as a sample. I did not import it at the request of the Government. I had received it through the United States mail from a foreign country. There was decidedly less than a quart. I had never tasted that brand before—no wine as cheap as that. If sake was in one glass and wine in another glass, not knowing in which each was, I could pick them out. Three months ago I would not have been able to do so because I did not know what sake was. But now, having had experience in sake to a certain extent and having decided to examine it closer, I think I can distinguish it.

131 I do not pretend to be an expert on wines. I have considerable knowledge of wines from my experience, necessarily. I am in the business, but experience means a great deal. I don't regard myself as an expert. I know what I am buying and I know how to value wines. I know how to judge them.

The REFEREE: That comes pretty near being an expert.

GEORGE B. SADLER, witness for the Government, testified:

Direct examination:

I am in the wine importing business with R. B. Henry & Sadler Co. I have been in the wine business directly about two years and indirectly connected with it for about twenty-five years. For a number of years I was the editor of Benfort's Wine & Spirit Circular, a paper published in the interests of the wholesale liquor trade of

the United States, and during that time I studied the process of manufacture of wine; I formerly edited the Standard Dictionary on wines and spirits. Then I visited Europe, and my visits to the wine and spirit districts covered Belgium, Spain, France, Germany and the United States. During all that time I found it necessary to taste wine and to compare different wines.

I think I first saw sake some years ago. It was given to me as a curiosity. I was not informed what it was before I examined it. On account of the color, taste, flavor, I came to the conclusion that it was a low grade type of wine. It had the general characteristics of wine.

132 I have carefully examined Jimenez & Lamothe sherry Exhibit 3 and I consider it a wine made from the grape. Between sake and Exhibit 3 there is a similarity especially in the flavor and taste. One might be a little dryer than the other, but you will find that in almost all wine coming from the same place no two hardly are alike. Exhibit 4 (Duff Gordon) is a type of sherry. There is a very slight similarity between that wine and sake. The Jimenez & Lamothe sherry resembles sake more than it does the Duff Gordon sherry.

Theoretically I know a great deal about making wines. In making wine the juice is pressed from the grape and then placed in casks or vats, according to the wine that is being made, and allowed to remain there; it goes through a process of fermentation until it becomes wine.

Generally the alcoholic percentage of sherry wines received in this country runs from 18 to 20 per cent.

Cross-examination:

Sherries are usually fortified. I am expert enough in regard to the taste of wines and beverages generally to be able to distinguish between sake and other wines. I can pick sake out of anything, because my training has been such by my nose and taste that I can do it. Sake has certain peculiar features of its own; unquestionably it has a certain bouquet and flavor of its own as all wines have.

I think I can pick the Jimenez & Lamothe wine out of a collection of wines. That is true of any wines of any characteristics at all.

By the term "quality" is meant the degree of excellence.

133 CHARLES R. OSBORN, witness for the Government, testified:

Direct examination:

I am an agent of foreign shippers and dealers in wines and have been connected with the wine trade since 1861. I have been all over the wine countries of Europe, most of them at least, France, Spain, Portugal. I was brought up in Portugal as a boy. To a certain extent I am familiar with the process of making wines. I had heard of sake, but I had never seen any to know that it was sake until the Government attorney showed a sample of it to me. At that time I examined it and formed an opinion as to what it was.

I thought it was some cheap Spanish sherry which grows in San Lusai District called Manzanilla, but I thought it had gone rotten.

Q. Did you find at that time that sake resembled wine generally in its characteristics, such as you were able to ascertain?

A. In some characteristics, yes.

Q. Will you compare Ex. 3 with the sample of sake and state if you find any similarity between then?

A. Well, there is some similarity of course.

Q. Do you consider sake to be similar in its taste to wines?

A. To some extent, yes.

In its odor you detect the yeast; it shows that it is yeast, grain yeast, or something of that kind put into it to ferment it. That is because my—I don't know it from the taste of it. You can distinguish the yeast very clearly.

134 The Duff Gordon is a sherry wine of a much higher class than the others. I don't think there is a similarity between the Duff Gordon sherry and sake any more than sake would have the same characteristics of any—of that class of sherry wine, because this Duff Gordon is worth three or four dollars per gallon, and that sake is not worth above $1.50 a gallon.

The Jimenez & Lamothe wine more closely resembles sake than it does the Duff Gordon, but both of those wines are too high class wines, with the idea of showing any decided similarity between them and sake. I think wines can be found in Spain that come a great deal nearer to it than that; I could find them.

I think if sake was offered as a wine it might pass with some people as a wine. Recognized wine experts would merely say it was like a wine or it has the characteristics of a wine. I don't think anyone who had never seen it would know what it was; I certainly didn't. I thought it was rotten.

When I stated when I first examined sake I thought it was poor wine and had gone rotten, I meant this: In the south of Spain there is a wine that is called Manzanilla, as I said; there are very poor qualities of that which wouldn't cost above a dollar. Sherry wines, when they come from one district are called Manzanilla, from another district they are Fino. Most of the sherries are made up from the Fino sherries, which are wines as they come from the vineyards at first; and some of those are very harsh and very poor. Those wines would somewhat resemble this wine, this sake. What puzzled me was that ferment, that yeast smell about it, that is what

135 puzzled me. I do not think I could detect that same smell or odor in any other wine.

Cross-examination:

There are no grain yeasts in wine. I have never imported the wine represented by Exhibit 3. (Jimenez & Lamothe) I don't deal with that house at all. I had not seen it at all until I saw it in connection with this case.

When I used the word "quality" I refer simply to a grade of excellence.

The term "wine" as known in trade generally, is limited to a

beverage which is made from a fruit juice, that is the generally accepted term, but of course there are one or two things you might say from which wines are made, like rhubarb, but outside of that it is generally the inside of a fruit—juice.

I have never drunk sherry warm. Port wine is the only wine I have ever seen drunk warm—mulled port, I think they call it in England,—and that is very seldom.

WILLIAM H. WILLIAMS, witness for the Government, testified:

Direct examination:

I am special agent of the Treasury Department, designated to the station in Chicago. In March 1906 I was in Malaga, Spain. I was out there at the request of the Government for the purpose of obtaining samples of certain wines manufactured by Jimenez & Lamothe. I obtained them, and I shipped them in bond to the office of the counsel for the Treasury Department.

136 (Witness identified two cases of Jimenez & Lamothe sherry wine, from which Exhibit 3 was taken, as samples purchased by him.)

Mr. CRANE: I renew my objection to the admission of Exhibit 3 in evidence, on the ground that it is a special importation and not generally dealt in in this country, and ask that all testimony concerning it be stricken out.

The REFEREE: Motion denied.

(Exception.)

CHARLES BELLOWS, witness for the Government, testified:

Direct examination:

I am a wine merchant and have been engaged in the wine business thirty-three years.

I have often been abroad and have always gone to the wine growing countries. When I went abroad in 1873 I spent about a year and a half in France—Champagne. I saw a good deal of the wine growing there and the general manipulation and handling of the wine. I looked at the wine more as a science than I did a business.

My first acquaintance with sake was after I had read something upon the subject,—about a month ago; I knew of course what sake was, but I never paid much attention to it. I always looked upon sake generally as being a wine made from rice. I know that. Mr. Levett called upon me with several samples of wine, without giving me any knowledge of what they were, and asked me to
137 compare them. I did so. I compared them, and I thought at first it was a sherry, a Manzanillo sherry that had gone wrong by the shipment of sea water or by some outside cause. The comparison of Manzanillo sherry with that is very close and very similar.

My reason for considering as a wine the sample of sake that was submitted to me was that it has the general characteristics of a wine. If I was asked that question without knowing anything

about it at all I should immediately class it as a wine. It appeals to me as a wine; has all the general bearings of a wine; looks like a wine, smells like a wine, at least something like a wine with salt in it. It has the general characteristics of a wine. It is pretty difficult matter to say what kind of a wine exactly, but I should have classed it without any question as being wine. Manzanillo sherry closely resembles sake.

Comparing Exhibit 4, Duff Gordon, with sake I find a similarity in taste and color. None on the nose, not in the slightest degree.

I certainly consider the Jimenez & Lamothe sherry a wine. It is a hard matter to say what kind of a wine it is. On the nose I find no resemblance between Jimenez & Lamothe wine and sake. Decidedly not. The sake has a peculiar stringent character, but in the general characteristic of wine or testing these two articles together, I should say it had a resemblance. If I was asked to classify these three wines together, (Exhibit 3, Exhibit 4, and sake), I should pronounce them all sherry wines, but this sake as sherry wine that has gone wrong. Sake would not pass in this country for a sherry wine among anybody who knew what sherry wine was. It
138 is my candid opinion that anybody in the wine trade who bought sake for sherry wine ought to go out of the business.

ERNEST C. LA MONTAGNE, witness for the Government, testified:

Direct examination:

I am a general importer of wines and liquors. My firm is E. La Montagne & Sons, of which I am the head. I represent twenty-six or twenty-seven houses. Barton & Guestier, Bordeaux, France, are the principal ones. Sandeman, Buck of Xeras, Spain. Sandeman & Co., of London, of Oporto, I should say. Louis Roderer of Rheims, champagnes. Jules Robin & Co., cognac. I have personally been in the wine business since 1873. During this time it has been part of my business to taste wines and classify them, pass upon them generally.

I am only slightly familiar with sake since I have had the opportunity to look at this wine—wouldn't call it wine—liquid or beverage.

I first saw sake within six months. When it was submitted to me by Mr. Levett, I made an examination of it for the purpose of determining, if possible, what it was, but only by comparison with other wines that we had. Before I was told what it was I was asked to express an opinion as to what it was, and my opinion was that it was very similar to a sherry wine, a light dry sherry wine, made in Spain. That is my opinion simply from the flavor and the general character of the product. It resembled in a great many ways the wines that I speak of, light sherry wines, especially light
139 sherry wines that I have tasted in Spain. I do not know of any article that sake more closely resembles than it does wine. Exhibit 3 (Jimenez & Lamothe sherry) is one of those light sherry wines such as I speak of, that you find in Spain, but I didn't think anybody had the pluck to bring it to this country, because they very rarely stand the climate. We have had

them, but they have not been powerful enough to stand the trip across the ocean and generally have gone wrong.

Comparing the Jimenez & Lamothe sherry with sake I find that they are very different in point of flavor. It is hard to make comparison of this wine and that wine, any more than you can make comparison with other wines; but the foundation seems to be like other light wines. There is something about it—you can tell a wine as well as you can tell a spirit.

The sample of sake bears the characteristics of a wine generally I should say. There is no resemblance between the Duff Gordon sherry (Exhibit 4) and sake.

Sake is a sweeter wine than either the Jimenez & Lamothe or the Duff Gordon.

I know in a general way how wines are made. I have never seen the pressing of the grapes, but I have seen wines prepared, gone through their fermentations and racked off and brought up to the merchantable condition; but I have never happened to be in any of the countries of production at the time that the grapes were pressed. I know of no wines that are produced, except from the grape. They manufacture wines of—what we call manufactured wines that are made of almost anything. But these are so-called imitations. Of course, we have never handled any, but I know that such things are made. But those are not true wines, they are imitations.

140 I have not handled the Jimenez & Lamothe sherry myself. All wines are made of grape.

Cross-examination:

I should say it would be dangerous to import as light a wine as the Jimenez & Lamothe sherry.

Q. You don't know of that kind of a wine being sold generally in this country, on account of its character?

A. The Amontillado is sold.

Q. But not this Exhibit 3?

A. Well, I couldn't tell you what quantities, we don't handle it. We have an Amontillado of our own, but not this Amontillado.

This wine, the Jimenez & Lamothe, is not a wine generally sold in this country but is confined to the markets of Spain on account of its character. I should say it would be dangerous to import as light a wine as that.

All wines are made of grape.

My experience with sake has been limited simply to the interview with Mr. Levett, Government Counsel. I never tasted it before. My experience is not as a manufacturer, but as a selling agent, simply.

If sake was submitted to me without any knowledge as to its name, I should simply say it is a wine. What it is made of, whether it was manufactured or not. I could not tell unless it was analyzed. A mere physical examination would not disclose the character of the wine—that is to say, what it was made from—not with my knowledge. I am not familiar enough.

I never knew that wines could be made of anything else
141 but grapes. Wines that are made of fruit juice, alcohol, water and then sometimes sweetened, those are not natural wines; those are what we would call manufactured wines. They don't pass in the trade as wine with anybody that knows.

I am enough of an expert in wine, in beverages of various kinds to be able to distinguish one from another by taste. If I had two glasses, in one of which was sake, and in the other of which was wine, without knowing which glass contained which—I would be able to distinguish the sake from the wine. Before I saw the sample of sake, not knowing sake at all, I could not have said what it was, but after tasting it, I could tell it from anything in the world, because of some distinctive flavor of its own. Just the same as I could tell Scotch whisky from any other whisky or beverage in the world.

By General Appraiser McCLELLAND:

Having in mind the trade understanding of the term wine as I have expressed it, I would say after an examination of sake that to all intents and purposes it was a wine.

Recross-examination:

As a beverage it has all the characteristics of a wine, with a peculiarity of its own, that is, it is distinguishable from wines generally, from fruit wines, by reason of its distinctive flavor, just the same as sherry is different from port or different from Madeira or different from claret. Different countries produce wines of different peculiarities, different characteristics, or different peculiar tastes; just as wine is different from beer or anything else. All honest wine is made from the fruit, from the grape.

142 By General Appraiser McCLELLAND:

With that understanding in mind, I would say after examining sake that it has all the characteristics of a wine.

Recross-examination:

Bearing in mind the trade significance of the term "wine"—that it is the product of fermented fruit juice, and that sake is produced from rice, I don't know that it would come under the head of wine.

By Mr. LEVETT:

Government concedes that the article is not a true wine.

Recross-examination:

I am not prepared to answer but I should say that the sample here has all the characteristics of wine. They might put before me a sample of some manufactured article which would be so beautifully made up that it would resemble wine—I would say it was wine. But if I knew what it was made from I would say it was not wine, but that it has all the characteristics of wine.

By General Appraiser McCLELLAND:

I would not class it among the class of imitations to which I have referred, because it is made from one article.

Recross-examination:

It is not a concoction; it is not a manufactured article. It is the general product of the rice going through the process—whatever it is, I am not familiar with it.

Redirect examination:

143 Each wine has a peculiarity as to taste by which you can distinguish it from other wines. That is true of all the different wines of different countries. Of course, all Bordeaux wines differ somewhat in character, but they are practically the same flavor. Sherry is the same way. You can tell a sherry no matter whether it is an Amontillado or an Olorosa or Vino de Pasto. Those are the three wines that are made in Spain. Those wines all have very much the same style, the same taste, but they are different in character. There is a different style in each one.

Considering whether I would have any trouble in picking out the Jimenez & Lamothe sherry from a lot of wines, that would depend on what the other wines were, if they were all very similar in character. We get sweet sherries and dry sherries, medium dry sherries. I would have difficulty if I had eight or ten samples of the same character of wine, dry wines like that, to pick this wine out of. That wine has a peculiar flavor of its own, the same as sake, and it is a light dry wine with Amontillado characteristics. It is not a real Amontillado. The real Amontillado is a most expensive wine and the best wine that Spain produces. I would say that as far as the individuality is concerned, the individuality of that wine was as pronounced as the individuality of sake.

HENRY E. GOURD, a witness for the Government, testified:

Direct examination:

144 I am an importer of wines and spirits at New York and have been in the wine business nineteen years, since 1887. I represent about 10 or 12 houses: Schroeder & Schiller, Bordeaux, one of the largest firms at Bordeaux, the Benedictine Company of Fecamp; Noily, Prat & Co., Marseilles, Williams & Humbert of Paris, etc. In the course of my business it is necessary for me to taste wines so as to be able to distinguish one from the other and understand their characteristics generally, because we are obliged to purchase wines all the time and see what we buy, and furthermore, compare them with the wines of our competitors to see what they sell. From that experience, I am as a rule able to determine the character of the wines that I taste. I will tell you Bordeaux wine from sherry wine, etc.

I saw sake some time ago when it was presented to me by Mr. Levett. When I first saw it my impression was that it was probably a low class of sherry wine, and I told the party who showed it to me

that I could show him another class of sherry far superior in quality, but which was about the same taste, except that it was a finer grade. We compared them together then. My reasons for thinking that the article was a wine are the general taste of it, the smell of it. I would consider it somewhat of the type of some low grade sherries. Exhibit 3 Jimenez & Lamothe I would say is a sherry wine.

(Same objection by Mr. Crane as before. Objection overruled.)

There is no real difference between Exhibit 3 Jimenez & Lamothe and sake. One is coarser than the other. The sake is the coarser, no mistake about that, but there is a resemblance. There is a resemblance in taste. It is very difficult to state the particulars of the resemblance except by the appreciation you have of the—
145 it is a question of tongue and nose, that is what it is more or less; very difficult to explain that in language. There is certainly a similarity. I wouldn't like to drink Exhibit 3, nor sake either. It must be a very inferior sherry. The Duff Gordon is very much the same class of wine as the other one, that I wouldn't care to drink either. It resembles sake in some of its characteristics.

The Jimenez & Lamothe sherry is more like sake than the Duff Gordon.

Considering all the characteristics of the Jimenez & Lamothe sherry I would consider that as a wine decidedly.

Q. Do you consider sake as a wine?

A. Well, I really can not.—I never tasted anything like the sake; it looks like wine to me; I couldn't state that it is a wine absolutely, but it is very similar to all the wine I know.

From my experience in the business, if I were to classify that article as one of the classes of materials which I buy and sell, I would consider it more nearly like a very low grade sherry; that is what it looks — to me.

Cross-examination:

I would consider sake coarser as to smell and the taste than the two sherries, and it has more of the taste of alcohol; the alcohol is more perceptible than it would be in the others. If I had in my hands two glasses, one of which contained wine and the other of which contained sake, not knowing in which glass the sake was contained, I would be able to distinguish between the two, de-
146 cidedly. That is because there is a marked difference between the two. There is a difference in the smell which is more marked even than in the taste. It is coarser. There is also a difference in the taste, but I say it looks more like a wine than anything that I know of, but I don't deal in anything but wines or spirits.

Particularizing the points in which it differs in taste from wines I should say it is not a question of acidity; it is a question of flavor. The flavor is different from these sherries but it more approaches sherry, or, if you like, sherry approaches it more than anything else that I know.

By General Appraiser DE VRIES:

I am not familiar with the characteristics of beer and ales. Sherries I import probably between sixty and sixty-five thousand gallons a year.

RICHARD JOHN THOMAS COOKE, witness for the Government, testified:

Direct examination:

I am manager of the United States and Canadian trade for Bass, Radcliffe & Creighton, Limited, Burton-on-Trent, England. I have held that position only about a month. Prior to that time I was manager for various English agencies for beers and stout. I came to this country to take charge of this business only a month ago. I have been connected with the beer business nearly 20 years with Bass & Co., and during that time have had experience in the process of making ales and beers. Although not a practical brewer, I have learned the system of brewing, and I have frequently ob-
147 served the manufacture of ales and beers, not only in our own brewery, but in scores of others.

Sake does not resemble in any respect any ale or beer or porter that I know. I don't see any likeness to beer. I take it this is a totally different article in the smell and taste from beer. I do not know of any ales, beers or porters which do not contain some percentage of carbonic acid gas. As I have observed the process of making beers, ales and porters, I have never seen any rice used and I believe no rice is used in England in the making of beers, porters or ales.

The bottle now shown me is a bottle of Bass & Co.'s strong ale, known as No. 1, strong ale, and as barley wine.

That is the article that is sold in this country under the name of barley wine. I believe that a malt extract could be made without hops, from malt, but I don't know any ales, beers or porters that are without hops. I do not know of any beers, ales or porters which can be produced without producing a malt extract and then adding yeast. The brewer's yeast used in making beers, ales and porters is a product of barley. I have never known of any beer, ales or porters to be produced without a boiling process at some stage of the manufacture.

Cross-examination:

The label on the Bass's ale referred to is Bass's label and would read "Bass & Company, No. 1 Strong Ale." The label which refers to the beverage as "barley wine," is not put on by Bass & Co. On barley wine we pay a duty of 20 cents a gallon—same duty as on ales and beers. It is supplied by Bass & Co., and put on by
148 the bottlers. McMullens, in bottling that beer, called it "No. 1 Strong Ale," because we have given the sole use of the word "Barley Wine" to another firm here. They are the only ones that use the term so far as I know, although they are not the only ones who sell this beverage. We supply it to many.

Draught ale is not still. It is n eless when it is still. I don't think of any beer which is of the color of sake. I have not seen Schlitz beer. I know Pilsener, but I don't think it is very near this color. I wouldn't say that those beers are as light in color as that sake. I am going by the appearance in looking through it; this sake has an oily appearance, whereas beer has a clear, thin appearance. They both have a yellow color. I don't think it looks as much like beer as like wine in that respect. The general appearance of it is quite different. The beer has a thinner, sharper brighter look. If the bottle of beer is exposed to the air, the carbonic acid gas in it escapes. After it has escaped it if not still beer, we call it rotten. Then it is not drinkable beer, and it could not be sold. A beer which is referred to as a rotten beer could not properly be called a beer.

I am not familiar with the beers dealt in in this country, and know nothing about lager beers, although I know about ale. In all my testimony, wherever I have used the word "beers," I have been referring to ales or porters.

I never tasted or saw sake before it was presented to me by Government Counsel, which was about a fortnight ago. I swallowed some, just enough to get the taste. That is all I have ever tasted.

149 J. McC. FARRINGTON, witness for the Government, testified:

Direct examination:

I am and have been since 1867 the examiner of wines and liquors at New York.

The lowest priced sherry I recall having passed is about 10 pounds a butt, that is $50. for 132 gallons. That was classified for duty at 50¢ a gallon. Italian wines pay 35¢ a gallon; the lowest price of those is 18 or 20 cents a gallon. A great many of those are imported.

Cross-examination:

The value referred to is the wholesale price abroad and not in this country. The prices in this country are higher because you have to add the duty and everything else.

W. NISHIMIYA, witness for the Government, testified:

Direct examination:

I am engaged in the restaurant business in New York at No. 40 West 37th Street, and have been so engaged during the last twenty years in this country. I cater to Japanese ladies and gentlemen, serving all meals in Japanese style. I serve sake at my restaurant. If I get a special order of a guest I serve in this bottle, holding about ½ pint but ordinarily I put it in small glasses; that is the way to serve the sake.

I serve sometimes in a sherry glass and sometimes in this china cup, Exhibit 5, holding about the same quantity.

150 I had a restaurant in Japan, and served sake the same way as in this country. In the Japanese restaurants they used

to serve sake to guests by the bottle referred to. All of the Japanese used to drink sake by this kind of cup. We served sake in our restaurant according to taste. The majority of the guests prefer it hot. Some people like slightly hot sake, and sometimes some people like, we will say, for instance, as much as tea is hot, regular table service tea; but the majority like it medium, about medium hot. People used to make it a little warm, or just plain cold. It has only two ways of drinking, for you don't boil it. If you boil sake that spoils everything.

Cross-examination:

We import sake in barrels. When I open the barrel and draw out the sake it bubbles up. And if the sake gets rotten—sometimes when it is old it gets rotten, and "busts." Some people use a larger cup then Exhibit 5. The largest cup I have ever seen sake drank from is the size of a beer glass, that is, I mean, a glass 4 or 5 inches deep. Some people like a smaller glass, and some people like a big glass. In Japan most of the laboring classes used to drink from a big glass about half a quart.

IWAO KAWAGUCHI, a witness for the Government, testified:

Direct examination:

I am a tea importer and have been in this country just three years. I came from Kobe, Japan. I was born and lived in Japan until I came to this country. I have had a little experience in the
151 sake business, because my grandfather was captain of a big sake brewing factory, and my father was engaged about three or four years in the retail business in sake; personally, I became familiar with the use of sake. The one shown me is the usual style of bottle used in serving sake in Japan; Exhibit 5 is the cup used. I think that most people used to drink cup slightly smaller than Exhibit 5. High-toned people used to drink by a small glass. Naturally when people want to drink a quantity of sake, they must drink by the small cup, otherwise they can't stand it. The common people would use a larger glass.

The laboring classes used to drink it cold. The better class would drink it warm, especially in dinners. They used to get it warm, but people in the street used to go into the saloon and just drink it cold. The big glass I mentioned is a glass of just a little larger size, used usually to drink beer, about eight inches deep, and three to four inches diameter. The better class of people can't stand that glass. When that big glass is used, they drink it cold generally.

Cross-examination:

When you go into a Japanese restaurant and ask for sake, they always give you the beverage called sake such as Exhibit 2.

FRANCIS WYATT, a witness for the Government, testified.

Direct examination:

I am a chemist at New York City. I am a specialist in the fermentation industry, and have been for the last twenty years official chemist to the U. S. Brewers' Association. I have made a
152 study of fermentation processes, as applied to the making of bread, the production of wines, beers and distilled liquors. I conduct a school of fermentology; I am a director and the head of the National Brewers' Academy, 402 West 23rd Street. At the request of Mr. Levett I have analyzed a sample of sake.

I have with me the result of that analysis. I determined the specific gravity of the liquid as received; I will give the figures:

Absolute alcohol by distillation (by volume)	17.05
Residual unfermented extract	3.60
Total acidity estimated as lactic acid	0.39
Residual sugars unfermented (estimated as maltose)	1.929
Ash	0.058
Albuminoids	0.018
Glycerine	1.14

Those are all the important determinations.

I am familiar with the process of producing wines. In 1872 I was assistant to Prof. George Ville, who was appointed by the French government to investigate the general causes of the phylloxera disease, which had devastated the vineyards of France, and during some six or seven months, I had opportunity not only of directly investigating and witnessing the general processes of culling grapes and the manufacturing of wines, but also of making a large number of microscopical and chemical examinations of wine; I have also since my establishment in New York as an analytical chemist had many opportunities of analyzing wines for commercial purposes, submitted
153 to me by various importers; I am familiar with the processes of producing beers. I am professionally retained as a consultant by one hundred and forty of the largest breweries in various parts of the United States. I have frequently analyzed wines; I have with me analyses made by me at various times; the type analysis which I am going to submit is selected from approximately three hundred analyses that have been made at various times in our laboratory during the past fifteen or sixteen years; it is an average type selected by me. In obtaining the averages, we classify certain analyses of wines and then take the average figures obtained from them all; these specific figures did not result from any specific analysis, but they were obtained by averaging the figures in numerous analyses. They represent what the trade accepts as the typical elements in wine, and more nearly represents what we understand to be wine; these figures are

Alcohol per cent by volume	11.17
Volatile acidity	0.03
Total acidity, estimated as tartaric	0.3
Total extractive bodies or unfermented solids	3.10

Unfermented sugar, as dextrose	0.35
Glycerin	0.48
Ash	0.12
Nitrogenous bodies	0.14

These averages were obtained from imported wines. In nearly every case the reading of the polariscope was practically zero, although in one or two exceptional cases, the polarization was slightly left-handed, which fact I attributed to the presence of a small quantity of levulose. I have not with me any typical analysis of
154 American wines.

The highest percentage of alcohol by weight that I have found in wines, approximately was 16.8%;—I could not state accurately the percentage by volume without reference to a table, but it would be somewhere in the neighborhood of twenty one, probably from twenty to twenty-one per cent by volume.

I have with me a typical analysis of beers; about eighteen thousand examinations were made as the basis for that; these analyses are representative of samples which have been submitted to me as an expert by members of the U. S. Brewers' Association, and by large brewers all over the country, during the past sixteen or seventeen years. I will give the figures under two headings: beers that are intended for draught purposes, and beers that are intended for bottling:

	Draught.	Bottling.
Alcohol per cent by volume	4.6	5.25
Volatile acidity	0.007	0.010
Unfermented residual solids commonly known as extract	**5.80**	**5.50**
Fixed acidity, as lactic acid	.14	0.15
Unfermented sugar left in the extract	1.50	1.40
Nitrogenous bodies	0.50	0.45
Ash	0.20	0.20

The analyses I have just read are lager beers, produced by what is known as bottom fermentation. Bottom fermentation means that the yeast used in the fermentation sinks to the bottom instead of rising to the top.

I now give you the average results from seven thousand analyses of American and imported ales. The first column is Ameri-
155 can ales, and the second column imported ales.

Alcohol, per cent by volume	6.00	8.10
Volatile acidity	0.012	0.020
Unfermented Extract or solids	5.50	4.40
Fixed acidity estimated as lactic acid	0.18	0.22
Unfermented residual sugars in the extract, estimated as maltose	1.70	0.95
Nitrogenous bodies	0.65	0.55
Ash	0.22	0.36

Ratio of alcohol to extract is as 1 is to 1.14 and as 1 is to 0.68.

The ash in the English beers is much higher than the ash in the American beer; this is not because of any difference in the brewing materials used, but because of a custom of the English brewers to harden their water by the addition of potassium or plaster of Paris.

In the course of my work, I have found it necessary to make a study of ferments or yeasts; I am thoroughly acquainted with all the modern works on the subject of yeasts, their morphology and culture as applied to all industrial purposes,—all industrial fermentation purposes. I am familiar with the characteristics of wine yeast.

I have prepared a diagram from our laboratory books of wine yeast, for the purpose of illustrating the physical *aspergillus oryzæ*. I show a yeast multiplied four hundred times from the sediment we found in sake; also a yeast multiplied four hundred times from a pure culture of Rhine wine yeast; also a yeast multiplied four hundred times from pure culture of brewers' bottom fermentation
156 yeast; or, in other words, lager yeast. With the diagram in my hand, I find that the yeast found in sake as seen by the microscope has practically the same characteristics physically as that of the wine yeast; and that it is entirely dissimilar from the brewers' beer yeast. This diagram was made by myself.

(Offered in evidence.)

Counsel for the importers objects to the admission on the ground that it is simply made by the hand of this witness who is not necessarily an expert draughtsman and there is no guarantee that this is an accurate portrayal of the microscopic reproduction. Objection overruled. Exception.

(Diagram admitted in evidence.)

Cross-examination:

I could have made a photographic reproduction of it.

Objection renewed, overruled, exception.

Redirect examination:

That is a description of what I found; it is a diagram of a characteristic wine yeast. The chief characteristic of wine yeast is that they belong to what are generally termed wild species, whereas beer yeast is what we term a cultured yeast. Wine yeast in general practice is naturally removed every year, because it is an inherent part of the husk of the grape itself; whereas the beer yeast is collected from each fermentation. In a large number of breweries in this country they have kept up the culture of one yeast from fermentation to fermentation for the last twenty years. Consequently, the beer yeasts are generally perfectly characteristic, homogeneous and very nearly always the same; whereas, the wine yeasts vary very consider-
157 ably, both in the physical appearance and in their general morphological character; they vary from each other and from their use of the wild species; vary in fermentative quality and vary in flavor producing qualities.

Wine yeasts do not vary to any extent in the direction of beer

yeast, so there might be confusion between the two; it would be absolutely impossible for a mere tyro of very short experience in a bacteriological laboratory to fail to distinguish the difference between beer yeast and a wine yeast. There are differences in form. Bottom fermentation yeast, known as lager beer yeast, has an oval or egg-shaped cell which stands out practically distinct and multiplies itself by budding at one end; the ale yeast is a perfectly round cell which stands out equally distinctly and which propagates itself by budding also, but generally has a very much larger vacuole than these. The wine yeasts have entirely different forms; generally they are in the form of sausages bound together in strings of three or four, and there are various species. Some of these sausages appear to be composed at right-angles, one added to the other. Some of them are extremely small round spheres. Others generally look about as tolula, because fermentation of wine is generally to be brought about not only by the propagation of these wild yeasts so called, but also by certain forms of tolula which I have not been able so far to investigate, and which I believe have not been thoroughly investigated.

The sake yeast, as I have diagrammed it on Exhibit resembles the wine yeast; and I call your attention to the peculiar elongated or sausage-like form of a number of the cells.

158 By Mr. CRANE: Same objection, same ruling and exception.

I find no resemblance between sake yeast and beer yeast.

The flavor of a fermented product may depend in a large measure upon the ingredients from which the product was made, but in a much larger degree upon the nature of the yeast or fermentative organisms by which it has undergone fermentation. I am not sufficiently familiar with the yeast used in making sake to say whether aside from its form and characteristics as shown by my diagram it has any resemblance to the yeast used in making sherry. Judging from the effect, I should say it is the same type of yeast. Judging from the taste and general character of sake, the same yeast has been employed in its production as that which is used in the production of sherry wine.

(Counsel for the importers moves to strike out the answer on the ground that the witness has already testified he is not familiar with sherry yeast. Objection overruled. Exception.)

Malt is produced in the process of brewing by causing barley to germinate under the influence of moisture and temperature. It is the seed inherent in the barley that germinates. Sometimes, there are accidents in malt houses, which introduce mold, but under those circumstances, the malt becomes inferior and it is generally regarded as very bad for brewing purposes.

I have read the description of the process of making sake, as given in the record in the case of United States v. Nishimiya. I have investigated the process of making sake in other quarters. I do
159 not consider the process described in that record under the head of "Malt" (moyashi) a malting process as the term is now understood, because the term "malting" as generally understood

in the fermentation industries of this country, requires the germination or growth or sprouting of the grain itself, due to natural causes and without any addition of any extraneous substances or agencies. The process described differs from that in that the absolutely clean rice, previously sterilized by steaming and heating, is infected by the addition to it of a mold known as aspergillus oryzae. Mold grows by generally creating a frame over the entire body; it is kept in the dark, as free as possible from access of air, and is covered by mats which are made from the grass of the rice.

I do not understand the substance described under the head of Moyashi as having any reference to the substance termed yeast. In the making of sake I consider the yeast the germs that have been introduced with the mold with which the rice is impregnated or infected after it has been steamed; and I also consider that the yeast may be derived from the outside atmosphere or probably may be taken from the straw mats themselves with which the steamed rice is originally covered. If that yeast was derived in either of the two ways I have last mentioned, it would be a wild yeast.

Malt, as we understand the term, could not be produced from rice by the process mentioned in the record. Malt could not be produced from rice by any brewing process that I know of because in the process of gathering in the crop and cleaning the rice, the larger portion of the germ is removed. A great many attempts have already been made in various parts of the world to make
160 malt, as we understand malt, from rice, but they have all been failures.

I do not know of any beers which are made without hops.

Taking the whole process of making sake, as described in this court record, I do not consider that process a brewing process, as the term brewing is understood. The brewing process, as it is generally understood in Europe and in this country, involves the production of a saccharine solution from a starchy compound in the form of malt diastase; it then involves the separation of that saccharine solution, and its boiling with hops for periods varying from two and three hours; it then involves the cooling of that liquid and its impregnation with a culture yeast of well-defined qualities.

From the examination which I have made of sake and from the taste and such other tests of it as I have made, I have come to the opinion that of all beverages that I know it most closely resembles sherry wine.

I am familiar with the term "open fermentation" by which is meant the conduct of the fermentation as it is universally practised in this country in open vessels. The process of making wine is a process of open fermentation. I have read the testimony of Dr. Endemann in the Nishimiya case and I do not agree with his statement that wines are always fermented in closed casks from which the air is carefully excluded.

As I have seen wines made in various parts of southern France, the grapes are unloaded into a press and the must is dis-
161 charged into a very large open vat or tun at a temperature which varies from 70 to 75 degrees Fahrenheit. In the course

of about thirty-six to forty hours, spontaneous fermentation begins to set in. This fermentation may go up to from 92 to 95 degrees Fahrenheit, and may last probably in some cases, depending in a great measure upon the density and composition and quality of the must of the wine, from fifteen to twenty days. At the end of this time it is put into closed vessels or casks for the purpose of cleansing itself, as they technically term it, or, in other words, for the purpose of a second re-fermentation, during which time the carbonic acid gas escapes into the air in exactly the manner described by Dr. Endemann. I am of the opinion that, in giving his description, Dr. Endemann was not familiar with or omitted the preliminary operation of fermentation.

In its preliminary phases, in the preparation of what I may technically term the various mashes, the process of making sake is more nearly allied to the process of making beer than to the process of making wine, for the simple reason that in the preparation of wine there is no preliminary process. But directly we come to the end of the initial stage, that is, to the point of fermentation proper, there is no more analogy between the process of making beer, and the process of making sake, than there is between the conditions of the sun and moon; from that point, the conditions, so far as I can see, are practically on all fours with the making of wine.

Sake is a still beverage. Sherry wine is a still beverage.

162 Cross-examination:

I have never seen sake made. My familiarity with the manufacture of sake is not confined to the description as contained in the Nishimiya record. My other information is the general information which is contained in all text books. I have had no personal experience in the manufacture of sake. I have worked in a beer brewery. Beer can be made from all kinds of edible farinaceous grains; it is made from rice frequently; I would like to add it is partly made from rice. The aspergillus oryzae is a mold with which rice is impregnated or infected; it grows and covers the surface of the rice. The result is a degradation of the starch molecules and the production of dextrin; it does not appear upon the malt. The rice has no connection with the malt. The mold grows upon the rice, and, during the process of its growth, develops certain functional products, known generally as enzymae; those enzymae have the power of transforming the starch into carbo-hydrates, sugars and dextrin, for example. This aspergillus oryzae is a mold. I have distinctly stated that in my opinion, when we are speaking of malt as applied to the rice from which sake is produced, we are not talking of what we call malt. In other words, the word malt may have been adopted by the manufacturers of sake to describe that particular product, but it is not what we term malt.

I think it would not be possible to produce wine by the sake process. Taking that process as a whole, it is more analogous and more similar to the process by which beer is made than the process

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by which wine is made. In its initial stages, it assimilates
163 to a brewing process. In a general way, I am inclined to say that the process of growing sake in its initial process has more analogy to the making of what we term "the mash"; the mash is a mixture of the moldy grain with water.

Q. You have referred in your testimony to what you call the initial stages in the making of sake. Now I ask you again to please designate wherein in the description the initial stages, as you call them, end.

A. I would like to see the description.

Q. Look at the paragraph in Adachi's affidavit with the heading "Shubu or Primary State of Sake." Do you mean, Doctor, that the balance of the process of making sake as described here is similar to the process of making wine?

A. No, it is much more similar to the process used in distilleries, in the manufacture of distilled liquors. It is not the process or similar to the process of making wines. But from that point the process of fermentation proper is more similar to wine than it is to beer.

There is no step in the process of making wine which is similar to the process described under the head of "Soyegake" in Adachi's affidavit.

There is no process in the manufacture of any other beverage with which I am familiar that resembles that of Soyegake.

Q. I call your attention to the statement under the paragraph headed Soyegake which says that four tubs of shuber are put into a tub which is stored in a conservatory and mixed with five gallons of yeast and fifty-five gallons of water, and the same stirred up
164 several times. Is not that a step which is characteristic of the manufacture or brewing of beer?

A. Yes, it has some analogy to the fermentation.

There is yeast used in the manufacture of beer; the artificial yeast as described in the sake process, in my opinion is not yeast but a mold. I never heard of an artificial yeast as a characteristic in the brewing of beer. The yeast used in the making of the beer is a well known species classified as saccharomyces cerevisiae. That is not produced artificially; it is not a mold; it is a fungus of a distinct character and type which originally was probably a wild yeast. It does not grow on the grain; it grows in the liquid. It is a dual function or a dual method of reproduction. First of all it exists as a fungus proper, and when it has exhausted all the water present it has to depend for existence on the decomposition of the sugars. Every mold is a fungus, but they have been subdivided by the botanists. Most maltose is produced by the action of diastase upon starch. In ripe fruits there is no starch nor any maltose.

I have found lactic acid in sake. It is produced by the action of a ferment, known as bacterium lactus, which has been introduced into the liquid either as an inherent constituent of the original ferment or as a possible impurity from the air.

We have lactic acids in wines, and we have lactic acids in beers.

Q. Would you say from reading the description of yeast in the

Nishimiya record that that is a wild yeast or an artificial yeast?

165 A. I am of the impression that the yeast in sake is a mold, artificially produced under the conditions in which they are working. It is artificially produced, but I think the origin is probably to be found upon the stalks of the grass, but as to that I don't know. I don't look upon this as cultured yeast. I would say it is a mold cultivated. I would look upon this yeast as a species of mold, because cultured yeast has to be subjected to continuous culture under the same conditions, under the same environments, the same temperature. By cultured yeast I mean successive growths of the children or offspring of the same parents for generations and generations. I would distinguish it from spontaneous yeast by its appearance and by the products of the fermentation. The yeast which we call cultured yeast was undoubtedly at one time wild yeast which has been adapted to the fermentation of beers, or ales or whiskies. Cultured yeast is the same yeast used over and over again.

What I have stated as a chemical analysis of sake contains all the chemical constituents of sake as I have found them.

The analyses I have testified to are not complete analyses; they are commercial analyses; those analyses don't contain the acids, nor the ethers. We have assumed that the fixed acid in beer was lactic; in my analyses of wines, we have estimated it as tartaric.

There is a great deal of difference in rotation between beers and wines. We generally have a large dextro rotation in beers,

166 indicating the presence of maltose and dextros, and in wines it is the reverse of zero indicating there are no dextrin or maltose; in other words, no starch transformation products, but there may be very minute quantites of invert sugar, particularly levulose. The purpose in a chemical analysis of determining what the rotation of a beverage may be—whether dextro-rotary or otherwise—is to find out as a general rule what the chemical composition of the unfermented sugar is, what the nature of the unfermented bodies is. We determine or ascertain the rotation as dextro-rotary or otherwise by an instrument known as the polariscope.

Whether the matter of rotation is an important element in the chemical analysis in determining the nature of the article depends entirely upon the kind of analysis to be made. If eager after the truth we have to know exactly what kind and what amount of sugars there are present, and we get it from the polariscopic reading. That enables us to say with greater accuracy than we can with ordinary chemical determinations the nature of the sugars present. Between maltose and dextrose there is a marked difference in the polariscopic grading.

The highest alcoholic strength in ale that has come under my observation was in a sample of imported barley wine, I think it was called, which contained 9.8 per cent of alcohol by weight. By volume that would be in the neighborhood I think of 11½. The highest strength of beers that has come to my observation did not exceed 7 per cent. The lowest alcoholic strength of wines I have ever had

was some Moselle wine which contained between 6 and 7 per cent alcohol by weight or between 7% and 8% by volume.

167 The residual extracts from beers contain as a general rule gum and resinous matter derived from the hops; they also contain variable percentages of maltose, dextrins, and malto dextrins. The residuum and unfermented extracts and solids of wines do not contain those; the residual from wines generally contains sugars of the dextrose type, small quantities of cane sugar, glycerine, various acids, some lactic acid probably,—I say lactic acid probably because lactic acid is not always present although I have found it in a large number of wines.

I have tasted sake once.

I wish to state you can imitate any kind of a flavor of any kind of a wine or any kind of a beverage by the employment of pure culture yeast.

W. D. BIGELOW, a witness for the Government, testified:

Direct examination:

I am a chemist, employed in the Department of Agriculture, Chief of the Division of Foods, Bureau of Chemistry of that department. I am in charge of all food investigations in the office, which includes the examination of foods with reference to their quality and purity, for the purpose also of establishing standards of composition and the enforcement of the imported food laws; and also chemical work in connection with experiments that are being made on the qualities of preservatives and other extraneous matters. My work covers food in its broadest term, including everything to eat and drink. I

168 graduated from college in 1889 and practiced chemistry continuously. I have had experience in the examination of wines. My work has included wines and beers for several years. I was what is termed referee of fermented beverages in the Association of Official Agricultural Chemists, an association whose methods are adopted as the standard in this country, and that has been authorized to establish standards for the composition of foods.

I have written articles on wines and liquors. Some years ago I compiled a collection of all extant analyses of reputable laboratories that had been made of American wines, and it was published as Bulletin No. 59 of the Bureau of Chemistry. In that bulletin I have given the methods of their analysis of wines and a discussion regarding their interpretation. I have written a number of other articles and a treatise on the subject that has been published in the National Encyclopedia.

I have made analyses of certain wines and beers marked respectively "Duff, Gordon & Co." Exhibit 4, "Jimenez & Lamothe" Exhibit 3, "Draught Ale" and "Bottling Ale." I have the results of the analysis here.

(Counsel for the importer- concedes the qualifications and competency of the witness as a chemist.)

The analysis of the sherry marked "Duff, Gordon & Co." is:

Specific gravity	0.98706
Alcohol by weight	14.84
Alcohol by volume	18.45
Glycerine	0.402
Extract	1.91

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Total ash	0.50
Alkalined and ash extract, expressed in cubic centimeters	0.10
	normal
Acid, per 100 grammes	12.16
Phosphoric acid, expressed as $P_2 O_5$	0.015
Total acids	0.43
Volatile acids	0.03

The analyses of the sherry, marked "Jimenez & Lamothe," is:

Specific gravity	0.98777
Alcohol by weight	15.32
Alcohol by volume	19.08
Glycerine	0.610
Extract	2.32
Total ash	0.48
Alkaline	14.58
Phosphoric acid	0.016
Acidity, total	0.40
Volatile	0.05

"Bottling Ale:"

Specific gravity	1.01308
Alcohol by weight	5.22
Alcohol by volume	6.65
Glycerine	0.192
Extract	5.47
Ash total	0.35
Alkalined	27.87
Phosphoric acid	0.061
Acidity, total	0.24
Volatile	0.04

170 "Draught Ale:"

Specific gravity	1.01408
Alcohol by weight	4.91
Alcohol by volume	6.28
Glycerine	0.176
Extract	5.78
Total ash	0.33
Alkalined	25.64
Phosphoric acid	0.057
Total acid	0.15
Volatile acid	0.01

The two samples of ale were fully charged with carbonic acid gas. I have in the course of my work had occasion to analyze a great many samples of wines and also beers generally. In Bulletin No. 59, in which a compilation of all extant analyses which I could find at that time are published, are numerous wines in the analysis of which I took an important part. I made a considerable part of the analyses but not all of them. I had charge of the work in Bulletin No. 72 where are published the analyses of American wines that received medals at the Paris Exposition in 1900, the subsequent edition of which I had charge of, either making all determinations or overseeing them, having them made under my direction. That includes the various types of wines made in the United States that were considered worthy of exhibition in Paris. We have examined also a number of thousands of analyses of wines of which the analyses have not been published; the Bulletin No. 59 is authoritative.

171 I cannot say what proportion of these analyses in Bulletin No. 59 were prepared by me personally or under my supervision. It has been a number of years since we prepared this bulletin. It was prepared in 1900, and the analyses were made before that. The analyses were prepared within a year or so after the Chicago Exposition in 1893 or 1894. These analyses in Bulletin No. 72 were published in 1903, and the analyses were made shortly before that.

COUNSEL FOR THE GOVERNMENT: The bulletins are offered in evidence only for the analyses contained in them.

(Counsel for the importers objected to their admission on the ground of irrelevancy and immateriality.

Objection overruled. Exception.)

Redirect examination:

In the course of my work, I have found it necessary to make a study of ferments or yeasts of wines and beers in a general way. I have had occasion to experiment with the effects produced in various yeasts. The line of my investigations has been to determine the influence of yeasts on the flavor of the fermented product, with the idea of determining whether natural or wild yeast could be replaced by pure culture to advantage.

I have also made ferments with wild yeasts and with different saccharine products. With beer yeast and wine yeast, using both those yeasts, I have fermented the wort made from malt. I have also fermented apple cider and grape juice.

I have experimented with wine yeast and malt liquors. The result is a product with a wine-like taste, the general character of a wine and the flavor of a wine. I have experimented on grape juice with beer yeast. The result of such experiments has been

172 the general flavor of a beer. That is with the exception, of course, of the hop taste of the beer, but with the general malt flavor of the beer. I attribute the wine flavor that I found in the article I produced from the malt fermented by wine yeast to the influence of the yeast on the saccharine product. As to the grape juice fermented with beer yeast, I attribute the beer flavor to the

peculiar influence of the yeast. In my experience generally with beverages, the yeast, as far as the flavor is concerned, is of very great importance. I do not mean in what I have said in regard to my production of a wine to imply that the product obtained by fermenting malt wort with wine yeast is of such a nature that a wine taster would mistake it for a good sherry. In my opinion it would not be of exactly the same taste as the product it assimilates, but it has all the general character and the characteristic flavor of the different class of products. I am not an expert wine taster, but it is part of the work, in the examination work in regard to quality and purity, to form an opinion of its flavor, and in all my work I have tasted the samples.

In my opinion, in giving sherry wine its distinctive flavor the composition of the grape must of the grape juice from which it is prepared, has an influence; the temperature at which fermentation occurs has an influence; the baking that sherry wine is subjected to after fermentation influences a change,—but the flavor of sherry wine cannot be obtained without the peculiar yeast, and it is the sherry yeast to which the flavor of sherry is very large due.

I have tasted the sample of Japanese sake before me. The
173 flavor of Japanese sake would be classed more nearly with the sherry type than anything else that I know of all the beverages tnat I have had occasion to examine. As to its taste it resembles sherry flavor. I attribute that taste largely, if not entirely, to the yeast,—the nature of the yeast. Judging by the similarity of the finished products, the sherry yeast and sake yeast must be somewhat related.

I am familiar with the process of brewing beer from studying the literature on the subject and visitng the breweries in connection with my analytical work on the subject of course. I am familiar with the term "malting." The malt as it would be used in the brewing process is never a molded grain. The malt sometimes molds, but that is something which is striven against in every possible way, the malster's idea being that the malt is ruined by molding.

I have read the description of producing sake as given in the record in the case of U. S. v. Nishimiya. In my opinion the process there described under the head of "malting" is not a malting process.

Mr. CRANE: I object to the witness testifying to what a malting process is. He is not a brewer and has had no experience. He is a chemist, that is all.

(Objection overruled. Exception.)

In malting, the barely is first sprouted and that sprouting causes a fermentation that is known as diastase, which is prepared by converting the starch into dextrin and finally into sugar and then maltose. In the sake process as given in the Nishimiya record the rice is first sterilized, heated, so its growth would be absolutely prevented. The diastase of the barley which is produced in the
174 barley is the result of the natural germination of the grain. In the sake process it is the result of a peculiar mold.

There is also a difference in the quantitative action. The inversion of the starch seems to be much more complete according to

this description than is true of diastase. Whether malt could be produced from rice by any brewing process, I don't know. Referring to the portion of the process described in the Nishimiya record under the head of "Yeast," I do not consider the product of that process as a yeast. It is not a yeast.

(Counsel for importers renews his objection on the ground that the witness is not an expert.
Objection overruled. Exception.)

Yeast is a fungus of quite a low order of plants. It feeds on sugars and multiplies. The product described is a mixture of the cooked product, which is here termed malt, and of the original product which has not been cooked, as I understand it, from the description given here. It is a mixture of organisms of all kinds. There may of course be some yeast, not in the sake, but in this product before it is cooked. There may be some yeast in it, but the whole mixture cannot be termed a yeast at all. Referring to the whole process, I do not consider that it is a brewing process.

(Same objection, same ruling and exception.)

The only similarity which seems to be between that process and a brewing process in the operations is the fact that they are both solid substances and it is necessary to mix them with water. The only reason that that is not necessary in the wine industry is that the original product on which we are working already has the
175 water present. Aside from the inversion of the starch, which of course is not necessary in wine because we have the sugar to begin with in the grape, there is very little difference between the process of making sake and the process of making wines; they are both wild yeasts, and after that stage there is very little difference.

Cross-examination:

Boiling is necessary in the brewing process before the article is complete; they are boiled after the brewing is finished, after the inversion of the starch by means of the diastase. If they boil the barley before it has been converted into malt, the barley would not germinate and no diastase would be formed.

I am familar with maltose. The sugar that is found in the grapes is known as invert sugar. It is a different type of sugar altogether from maltose; the maltose may be hydrolysed with acid, that is converted into two sugars; by this hydrolysis two sugars are formed, one of which is dextrose and the other is levulose. As to the difference between dextrose and maltose, maltose does not ferment,—it is not fermented by wild yeast. Sugar of the grape is fermented by ordinary yeast. Maltose rotates polariscopically to the right and invert sugar somewhat to the left.

I have never made any beer except in a small way in the laboratory several times. I believe I have made 150 runs of beer, not in large vats as found in breweries; that is, two or three quarts. The operation is just the same as on a larger scale. I have visited breweries

several times a year. I used to frequent them more fre-
176 quently than I do now. I have never worked in a brewery.
I have never been engaged in the manufacture of wines myself. I have never sold wines. In our work in judging the quality of wines we come in very close touch with the manufacturers, and in close consultation with them; and in our work in the enforcement of the food law we have to do directly with the quality of wine as influenced by methods of manufacture. My knowledge as to the manufacture of wines and beers is only as a chemist, and from what I have seen. We have made wines in an experimental way in the laboratory very often in small quantities. I have never seen sake made. My knowledge of its method of manufacture is derived from the record in the Nishimiya case, and from other literature on the subject. I have had no personal experience.

I don't know of any grain yeast. The wine yeast comes from the skin of the grape, and until recent years it was always wild yeast. They now make some pure cultures from grapes, but they are all made from the yeast that is found in the skins of the grape. The beer yeast is cultivated especially for use. The two are different in nature to some extent, the results are different so far as affects the flavor in the final product. I make a distinction between wine yeast and beer yeast as affecting the flavor. I cannot say as to similitude between sake yeast and wine yeast. I have never examined sake yeast; have never seen it that I know. I can judge by the flavor and the composition of the product whether sake yeast is the same as wine yeast or not. In the samples of sake I analyzed I saw the
effect of the yeast in its formation. I did not examine it to
177 see if there was any yeast still in it. I made no microscopic
examination. It is fairly clear. There is not much there, if any. Maltose is one of the results of the action of the starch. There is no starch in fruits thoroughly ripe.

I have tasted sake very frequently. The last I tasted was this sample. I would not use it as a beverage. It is not acceptable as a beverage anyhow. The taste of all wines is not agreeable to me. The process of manufacture has a direct bearing upon the taste of an article. A beverage produced by a brewing process as applied to a farinaceous grain might produce a beverage tasting different from beer. It depends on the nature of the brewing process, which may be absolutely different. It may not have any fermentation at all.

I regard the description of the making of sake in the main similar to the making of wine. I have heard of wine made from a grain. Some years ago there was a process patented first in Germany and then in this country for manufacturing wine of a different type from malt. All I have seen of wine made in this fashion is what I have made myself. I made it first 12 or 14 years ago when I first saw this patent. I succeeded in making it.

Dr. H. W. WILEY, called for the Government, being duly sworn, testified as follows:

Direct examination:

I am a chemist by profession; first, a physician and afterwards a chemist. I have followed the profession for about thirty-one years.

178 I am a graduate of Hanover College, Indiana, degree of A. B., M. A., and A. M., graduate of Harvard University, degree of B. S.; graduate of Indiana Medical College, degree of M. D. I have won degrees Ph. D. and LL.D. from Hanover College. At present I am Chief of the Bureau of Chemistry, Department of Agriculture. I direct and examine into all the work and chemistry relating to agriculture in all its phases.

I very frequently have occasion to analyze, or to have analyzed under my supervision samples of wines and other liquors. I have occasion also to become familiar with the tastes and general characteristics of such beverages. The extent of my investigations in the manufacture of all kinds of alcoholic beverages, fermented and distilled has been large and special and includes tasting and comparison of the various kinds one with the other. I am familiar with the process of making wines, beers, ales and porters. I am familiar with the term "malt" as applied in the brewing processes.

The term "malting" is applied to grain sprouted, like barley, under proper conditions of temperature and moisture, allowing the germ to grow to a certain length. The radicles start to grow after from 8 to 15 days according to the temperature and the degree of moisture. The process is checked by drying. In the process it is always necessary that the germ which sprouts be inherent in the grain as it is the germ of the grain itself which produces the new plant. I am not familiar with the process of making Japanese sake.

179 It would not be possible to produce malt from rice of which the outer husk and the inner brown coating had been removed and which had been thoroughly cleaned and then steamed, if the heat was long enough continued to kill the germ. If steam cooked rice has produced upon it a fungus growth or mold by the deposition thereon of an extraneous germ, the product thus formed, being the rice with mold upon it, would not be a malt because the term malt must be confined by definition in common usage to the material produced by the growth of the germ of the grain as described. Assuming that the result of the growth of this fungus on the rice results in the partial conversion of the starch of the rice into sugar, it would not be malt. The sugar might be formed but it would not be formed by malting. This process is what is known in this country as the Taka diastase stage. That is a product of malt or mycelium, but it is not a malt.

Assuming that the rice thus affected by the fungus growth be mixed with other rice until such other rice has become affected, and finally a quantity of affected rice is placed in a tub with water and fermentation is thus set up at natural temperature; and assuming further that the fermentation is allowed to become complete, that the resulting liquid is then drawn off filtered and afterwards subjected to

a heat sufficient to sterilize it, the latter part of such process would be a brewing process. The process is used by brewing or fermentation. But the first part, the preparation of the material for fermentation is not a brewing process in the sense that the term brewing process is used in this country, nor in England, nor in Germany.

I know of one variety of beer that is made without hops; it is called Weiss beer in Germany. It is made from wheat and has no hops in it. I would not consider that a true beer. It is
180 never sold as a beer, but as Weiss beer. No one would give you Weiss beer in Germany if you asked for beer, you would have to ask for Weiss beer.

The highest percentage of alcohol that I have ever found in beers has been in English beers, or ales, as they are called sometimes, where I have found as much as 6 per cent, perhaps a little over, may be 7 per cent occasionally.

Carbonic acid gas is always formed in beers at the same time the alcohol is. It is characteristic of beer if the beer is confined so that it cannot escape. Carbonic acid gas is always found in beer in all countries as far as I know. It is one of the characteristics of beer, the natural product.

I have examined into the question as to what gives wines, beers and other liquors their characteristic flavor. The variations in the flavor of wines are due to three principal causes, namely, the character of the grapes from which they are made; the conditions of temperature and other conditions in which the fermentation takes place, and the character of the yeast which produces the fermentation. As far as flavor is concerned, the yeast and the conduct of the fermentation seem to be the dominating factors. I have had made under my supervision very extensive experiments as to the results produced by using different yeasts on beverages. Our experiments were made solely with apple must which was sterilized so as to kill all the natural ferments it contained, and then seated with yeasts obtained from the cider factories of various parts of the world, pure cultures. We made from the same must as many different
181 kinds of cider as we used different kinds of yeast, each having a characteristic flavor in quality some being almost impotable and others being good. Here the dominating factor could have been nothing but the yeast, all other factors remaining constant.

I have had a very large experience as an expert taster of liquors over a period of a great many years. I constantly taste liquors with other experts in order to compare our ideas thereon. I mean by liquors, fermented beverages and distilled liquors of all kinds. I served as an expert on the beer and wine jury at the World's Fair in Chicago in 1893. I served for five months on the wine jury at the Paris Exposition of 1900, with all the greatest experts of the world. I have on three or four occasions in the course of my work tasted a beverage similar in its taste and characteristics to a wine but in the making of which no grape juice was used, it being made from the same materials that beer is made from, but fermented from the yeast peculiar to a claret fermented with a claret yeast. There the only possible cause for the similarity in taste of that article to wine must have been the yeast itself.

I have never, except in California, investigated the making of sherry wine. I would say that it would be the fermentation and the yeast which give sherry wine its characteristic flavor, because my personal observation of the process in California—I have never studied it in Spain—shows that the fermentation is carried on at a very high temperature, thus producing an activity of a yeast of a peculiar character, and the flavor of the sherry wine I ascribe
182 to this character of its fermentation, to the yeast developed under a high temperature, thus possessing different properties from a yeast at a lower temperature.

I cannot do any more than express an opinion, but I think the raw material from which sake was made has a good deal to do with its flavor, and the rest of it must be due to the condition in the fermentation, the character of the yeast, and the temperature, whatever they may be, to give this beverage that peculiar flavor which it possesses.

I have tasted and compared sake with the Jimenez & Lamothe sherry. They apparently have the same degree of dryness; that is, there is no sugar left in either of them so far as my taste goes, and they have something of the same characteristics and yet are quite different in flavor. But there is a resemblance between the flavor of the one and the other which is quite marked. There is no question in my mind that sake resembles this beverage (Jimenez & Lamothe) Exhibit 3 more than any other kind of beverage I have ever tasted. Taking beverages by classes such as wines, beers, liquors, etc., so far as my experience goes, and it is very extensive, sake most resembles a dry sherry.

Assuming that the raw materials from which they are made are different, and eliminating that factor, then, the similarity in taste between sake and this sherry I would say would be due to the yeast and temperature and conduct of the fermentation.

The Duff Gordon (Exhibit 4) is a dry sherry or wine of that type.

Comparing this sherry (Duff Gordon) with sake, judging from the finished product irrespective of the original material I
183 would not consider that they are the same class of beverages, because there is a very distinct difference in their flavor, but they have a flavor which is quite strong.

Taking the term "class" in the sense we have used it before, being descriptive of different wines, beers, liqueurs, etc., I would consider the Duff Gordon sherry and the sake were in the same class as being more nearly related.

(Witness, after tasting, continuing:)

It is very different and yet there are resemblances in taste between the Duff Gordon sherry and the sake. I could easily see how a person might be misled in one or the other who is not familiar, or even if familiar he might be misled, as I have seen much greater experts than I who were totally misled in respect to the character of a beverage in tasting it.

By the REFEREE: In my judgment sake more nearly resembles a vinous liquor of a high content of alcohol, and what we call fortified wines, than it resembles spirituous or malt liquors.

Almost every wine is further removed from the Jimenez & Lamothe

sherry than sake is removed from the Jimenez & Lamothe sherry. That is, if you take an ordinary red wine, for instance a Bordeaux wine, its flavor and general taste is more different from Exhibit 3 than the sake is from Exhibit 3.

I do not see any pronounced relation between the general taste, flavor and character of the sake and the beer. In this country a great deal of rice is used in the manufacture of beer. The mash is made of malt in the usual way, barley malt always being understood
184 when the term is used, meaning malted barley, and to this malted barley, which is the basic constituent, the rice is added, ground into a form of fine meal. The diastase of the barley malt converts the starch of the rice into sugar, and then the sugar which is in the barley malt and the sugar which is made from the rice are fermented together afterwards, with an infusion of hops to make the beer. The rice is not malted.

Malt is not a mould. A mould may grow on malt. That is not malt. It is malt before. I am familiar with maltose and dextrose. Both are sugars.

Cross-examination:

I have been twenty-three years in the Government service. I have made special experiments for the purpose of determining the influence of the raw materials on the character of the wine. It takes about five years to make a wine, and we have been about three years at it now.

I have seen beer made in dozens of places in this country; dozens in Europe; and in all the great beer factories of England and Ireland. I have made a special study of it.

The process which is used in the manufacture of beer from rice which does away with the necessity of the malt, is to use a sufficient amount of malt to convert the starch into sugar without malting, just as they use unmalted grains constantly in this country for making beer, unmalted barley, unmalted Indian corn. There is no rice malt used in making rice beer. The purpose of malting is to convert the starch into sugar. Starch will not ferment of itself. It must first be converted into sugar. Malt contains a diastase naturally.
185 I mean barley contains the diastase naturally, but in fermentation the quantity of it is immensely increased and immediately converts the starch in the barley into sugar and has enough left over to convert another starch if necessary.

A process in which there is a diastatic action resulting in the conversion of starch into sugar is similar to a malting process in so far as the making of the sugar is concerned, but the kind of sugar may be very different. Where the resulting sugar is maltose the chemical process is the same in both instances. Both processes would be a diastatic process, not a malting process. The malting produces the diastase and the diastase converts the sugar. Where there is a diastase there need not necessarily be a malt.

Very few diastases are made by malting. Diastase in the saliva is not a malt diastase. It is the most active diastase known. In thirty

seconds in your mouth you can convert starch into sugar by the saliva. That diastase is not a malt diastase. In the stomach the pepsin which is secreted ferments the albuminous substances, and that is not a malt product. That does not make sugar. In this country so far as I know barley malt is always used when beer is brewed from rice. A malt could be made from rice I presume. It could be made from other cereals. I know malt is made from wheat, rye and Indian corn. A malt from rice cannot have over one-fourth or one-fifth of the diastatic power of a malt made from barley, because rice has very little nitrogenous constituents, only one-fourth or one-fifth as much as barley. But I think a malt could be made from rice.

186 In California the temperature at which wine is fermented in the process of its manufacture rises sometimes to 80 or 85 degrees. In Germany and France rarely above 65 or 70. In New York and Ohio from 65 to 76 degrees Fahrenheit, with the exception of sherry. In the fermentation of sherry if they do not have enough heat naturally they heat it artificially up to 90 or 100. In ordinary wines the lower you can get the temperature the better; the slower the better. No artificial heat is used.

A substantial difference would result in two beverages that have been produced at considerable difference in temperature, because the character of the yeast is always changed by the temperature and environment; that is, the yeast that has been subjected to a high temperature would produce a different result from a yeast subjected to a much lower temperature. A finished product in which a yeast has been used in the process of its manufacture would be different in character if the yeast had been subjected to a high temperature from what it would be if it had been subjected to a low temperature. The kind of yeast will have a remarkable influence upon the character of the article in which it is used.

I have heard the term grain yeast. I suppose it means the ordinary saccharomyces cerevisiæ. The term grain yeast, as I understand the term, as popularly used, might be called a mass of pure cultures. The character of the yeast has a very important bearing upon the resultant taste. If there was a difference in the yeast the resultant taste would necessarily be different. If all other conditions

187 were the same and the yeast different, the taste would be different. The original material out of which the beverage is made has a very marked effect in the taste and general character of the beverage. A beverage which is produced from saccharine juice of fruits would have a marked difference in character and taste from a beverage produced from a farinaceous grain, if all the other conditions were the same. It takes about five years to ferment wine before it becomes the finished product, and lager beer takes about eight or ten months to ferment. Beer is beer even after the gas has been allowed to escape. There may be still ales. I have not drunk any. Weiss beer is made by the fermentation of wheat, malted with the addition of barley malt, without the addition of hops. The process of manufacture is the same as beer without hops being present. I have drunk it many times. I know it has no hops in it. Beer is

now defined as an infusion of hops with the other materials, so beer without hops would not be beer. The term beer would not cover a beverage which contained no hops. For instance, nobody would ever get Weiss beer by asking for beer, nor hop ale beer by asking for beer, nor root beer by asking for beer. So Weiss beer is not beer.

The common acceptation of the term wine means an alcoholic beverage produced from grapes. Wine is made from the fermented juice of grapes. That is the standard fixed under the authority of Congress by the Secretary of Agriculture. It defines wine as such. That does not exclude the use of wines with other words to limit it.

188 I have tasted sake on three or four occasions but never with any attention until this case arose. The Taka diastase to which I referred is a diastase produced by a Japanese named Takamine.

Redirect examination:

Beer from which carbonic acid gas was allowed to escape would not be a merchantable beer. Rice is never malted in the beer process, as far as I know. The purpose of using rice in making beer is to give it a lighter color and less body to the beer; not so much extract. I doubt very much if rice ever contains a sufficient diastase of its own to convert all of its starch into sugar. In making the beer, artificial heat is always used in boiling the mash, in making the infusion of hops. I used the term "yeast" in its general sense, including all varieties of ferments that make alcohol and carbonic acid gas out of sugar. There are hundreds of different yeasts. When I speak of yeast I mean anything of that character which will convert sugar into alcohol. The beer yeast is known by the name of saccharomyces cerevisiae. I mean the yeast without any wild yeast of any kind in it, the pure culture. There is always moisture in it and other materials on which it feeds. It has to have mineral salts like phosphates and potash and organic matter. It is a plant that grows just like a tree. It has to have something to feed on. In the condition in which it is added to beer it is mixed with the food on which it grows.

By wild yeast is meant one that is different in its species or genus from the saccharomyces cerevisiae. I doubt whether a yeast which is produced by the deposition of germs on rice, producing
189 thereby a fungus growth, would be a yeast at all. I would say it is now known that the yeast takes no part in the fermentation. I am referring to saccharomyces cerevisiae, or any other yeast. The yeast secretes a diastase which converts this sugar into alcohol and carbonic acid gas, but that diastase is entirely different from the one that converts the starch into sugar. One is malt diastase and the other is a yeast diastase. Diastase is understood to be a chemical reagent which produces by catalitic action a chemical change in the body on which it works. Catalitic action is an action produced by an agent which is not changed thereby and taken no part therein except exciting it, so far as we know. It is a carrier. After the fermentation is over the diastase is there the same as before.

If the yeast used in the fermentation of grain and fruit were different, the product would be different. The actual chemical reaction in the fermentation of beers and wines is the same. It is a conversion of sugar into alcohol and carbonic dioxide. That is done by hundreds of different substances, but the by-product is what gives to every beverage its flavor. Alcohol and carbonic acid are the same in every alcoholic beverage, but the peculiar flavor and character of beverages are due to the secondary products and not to the alcohol which is the same in all cases. The secondary products are those which arise in the difference of the raw material and the difference in the character of the yeast.

Wine is always the product of an open fermentation. They keep wine in casks to be sure, but they always have a vent to let the gas out. But the fermentation is in open tanks, the same as beer.

190 I consider sake a still beverage. I do not think it is an effervescent beverage at all. Beer is never used still as a beverage. There may be still ale, but I have never seen or heard of it.

Recross-examination:

The yeast which is used in beer brewing is a cultured yeast, that is, as distinguished from a wild yeast. The cultivation of the yeast is one of the most important things in the beer industry. They are kept in a room where they are free from contamination, where the temperature is kept right and if any false yeast gets in it is all thrown out and new yeast is made. Such yeast is kept always in large tubs and kept covered with water. The yeast is at the bottom. That substance is known as brewer's yeast. The beer yeast is very different from the wine yeast.

Redirect examination:

I am not an expert in making up the cultures. I know what they are. They always contain phosphates and potash salts and organic matter, but I do not know just the proportions in which they are used. Wine yeast is a cultivated yeast. All countries are now producing cultivated yeast to see if they cannot improve the character of their wine, but it has never come into common use. It is only experimental.

WILLIAM FORN, witness for the Government, testified:

Direct examination:

I am brewmaster for the Christian Moerlein Brewing Company of Cincinnati, Ohio, and I have been that firm's exclusive

191 brewmaster since November 1, 1903. Up to that time I had been assistant brewmaster. Prior to that I learned my trade as an apprentice, and I also worked for several months at Adam Schantz's Brewery at Dayton, Ohio. I attended the Wahl-Henius Institute to study the scientific end of the brewing and the theory of it. I graduated with a diploma, and I also attended in 1898 their special course, called the Pure Yeast course. The Moerlein Brewing Com-

pany is the largest in the state of Ohio, and in sales ranks about the eighth or tenth in the United States. I supervise the manufacture of beer and the entire plant is under my supervision.

In our process of brewing, the barley is steeped or soaked with water, at about 55 degrees or 60 degrees F. The barley is spread on the floors, and allowed to germinate. During this germinating process, diastase is formed in the malt. After the barley has been sufficiently germinated, it is put on kilns and dried, which process stops the barley from germinating any further. It must be thoroughly dried so that on storage it doesn't form mold. Mold is considered a detriment. From this very point it is termed malt. It is then stored for several weeks before it is used, as fresh kiln dried malt is of no advantage for immediate use.

After the malt has been on storage about six weeks it is taken to the brewery mills and crushed and soaked with water at a certain temperature. Different brewers use different temperatures running from 100 degrees to 130 degrees F. This is done to extract the diastase from the malt. If cereals such as rice or corn are used in
192 a brewery, they are first boiled from three-quarters to probably an hour and a quarter until the starchy matter has been completely dissolved. I have never heard of rice being malted for use in brewing beer. I have heard of corn being malted. When corn and rice are used they do not go through any malting process before they are subjected to this heat.

As stated above, in this raw cereal mash there is a certain portion of malt added to partly convert the starch of the raw materials and the malt into sugar. This raw cereal mash is then run into the mash tub with continuous starting, and after the raw cereal mash is down in the mash tub, the temperature in the mash tub will be about 156 degrees to 165 degrees F. It is allowed to remain at this temperature for three quarters of an hour to an hour until the entire mash doesn't show any more starch reaction by the test with the iodine solution. After the brewer is satisfied that the entire starch is converted into sugar by the action of the diastase which has been extracted from the malt, the liquid is drawn from the mash tub, the mash tub being provided with a perforated false bottom to retain the grains, and this extract, which is now termed wort, is run into a kettle, the grain being sparged with water at a temperature of 180 degrees to 185 degrees F., until practically all the sugar has been extracted from the grains. Naturally, caution must be observed that the brewer gets his wort into the kettle at a certain percentage desired.

This wort is boiled in a kettle and a certain amount of hops are added to the boiling wort to precipitate the albumen more thor-
193 oughly and to give the beer a flavor and bitter taste. After the wort in the kettle is completely precipitated from its soluble albumen, it is cooled off over open or closed coolers, run into the fermenting cellar at certain temperatures, and yeast added. The fermenting period differs according to the temperature at which the wort is started for fermentation. The average fermenting at our plant is about ten to twelve days in the fermenting tub. The fermenting liquid rises to a temperature of about 45 degrees F., there

being temperators or coolers in these tanks to keep the temperature so that it does not rise too high in temperature. After the fermentation is practically completed, it is tapped at the sides and run into storage tanks where it is aged and a secondary fermentation takes place, which is very slow. From the storage tanks it is pumped to the chip tanks and clarified and kraeusen is added to it. Kreausen is fermented wort or wort in a high stage of fermentation, which is added to this storage cask to get the necessary carbonic acid gas into the liquid. The tanks are kept under pressure of about five or seven pounds to the square inch. The liquid is saturated with a certain percentage of carbonic acid gas and allowed to remain in these tanks until it is perfectly clarified and has sufficient gas, where it is filtered and racked off and sold by the keg.

I never saw sake until it was shown to me some time ago by Mr. Levett. I am not familiar with it.

In the course of my business it has become necessary for me to become familiar and an expert in the tests of beers and the qualities of beers and the general characteristics of beers.

194 Examining the sample of sake, Exhibit 2, and tasting it I do not find any similarity between sake and any beer that I know. I do not find that the odor or taste of sake is at all similar to beer.

I do not know of any beers that do not contain in commercial state carbonic acid gas. When I first saw the Japanese sake I thought that it was sherry. It has a taste similar to sherry.

(Counsel for appellees moved to strike out witness's answer in regard to any alleged similarity to sherry on the ground that he had not shown a knowledge to testify as to similarity to any wine. By consent, above motion is to be passed on by the Court, and the witness's answer is allowed to stand subject to the objection and the decision of the Court thereon.)

Prior to the forming of my opinion as to what this article was, when it was first shown to me, I do not think I was told what it was; I don't remember. When I saw it I did not think that it was a beer.

I have read the description of making sake contained in the Record in the case of U. S. vs. Nishimiya.

When I use the term "malt" or "malting" in the brewery business I mean malt that has been made from barley by the germinating process or malting process. That is, the barley contains a germ which is grown in the malt for the purpose of getting the diastase. I never heard of any malt that was produced by the growth of an extraneous germ deposited on the grain. I do not consider the process of making sake described under the head of "Moyashi" to be a malting process as the term "malting" is understood in the brewery trade.

195 It is a mould, a fungus growth, a propagation of mould, which in the malting process would be a very serious matter—if mould was to form on the malt; it would impart a very mouldy flavor and taste to the malt and to the manufactured beer which would be very obnoxious and the trade would not stand for it. I do not think it would be possible to make a malt from steamed rice because if

there were a germ in the rice that could be germinated, it would be killed by the steaming process.

Considering the entire process of making sake as described in the record in the Nishimiya case, I do not think it to be a brewing process. From the description it appeals to me as a spontaneous way of fermentation. In the manufacture of beer we have no such fermentation as spontaneous fermentation.

I do not know of any beers that are made without hops. I have never brewed ales, because I am not in the business, but I know of its process. In my experience ales all contain more or less carbonic acid gas; even if they would call them "still ale," there is always a small percentage of gas contained in same, because it is a fermented beverage.

The diastase which converts the starch into sugar, in the making of beers, ales and porters is not found in the grain itself which is used in the manufacture. It is produced by the malting process, by the germinating process. The germ that germinates in the making of malt is found in the barley. I do not know when rice was first used in the making of beers. The purpose of using rice in making beer is that rice itself has a bigger yield of extract than malt, and more starch also. We get more sugar out of the rice after it
196 has been mashed. To my knowledge beer, ale or porter could not be produced by subjecting any grain to the process described in the Nishimiya case as the process of making sake.

Percentages of alcohol in beer vary from about three and a half to a trifle over four per cent of alcohol.

Cross-examination:

We use rice in making beer but not exclusively. I must use malt, and another mixture, say rice with the malt. In some beers I use malt and rice only. In other beers I use rice, malt and crushed corn or what they term "grits." In all these cases of the manufacture of beer hops are used in certain proportions from three quarters of a pound to a pound per barrel, whatever the trade requires as to its taste and bitterness. The germination in the barley produces the diastase through the germination and sprouts. It is a growth. It looks like roots on the tips of the barley.

That is partly a stage of decomposition. Part of the body of the barley is decomposed in the process of making malt. It is utilized through the growth of the grain. After the germinated barley is kiln dried, it is termed "malt" then. To produce the germination or sprouting or decomposition the grain is subjected to 65 degrees or 70 degrees during the germinating period. This heat is generated by its own decomposition, by its own growth. Some use the pneumatic systems and some use the floor systems. There must be water added; the grain must be sprinkled. In the floor system it is spread on cement floors in layers of about four or five inches high and allowed to germinate, being turned over several times during the day to have an even growth in all grains.
197 As I explained before, when the barley has reached a sufficient growth desired, it is subjected to a very dry heat upon

the kilns and deprived of its moisture, which stops the further germination or further growth of the germs.

The barley must be deprived of its moisture after it has been sufficiently germinated. Mould is a fungus growth, a state of decomposition. Mould cannot be formed in the early stages of germination of the grain. When rice is used in the making of beer, it is boiled. We don't use barley in making beer until it has been turned into malt. We do not add the barley to the mash like you would add rice. I have never heard of barley being used directly in the mashing process. We use malt, germinated barley malt, with the rice to make the beer. The rice is boiled and added to the malt, to be converted into sugar by the action of the diastase, which is in the malt. Rice being very flinty, it is boiled to make it more soluble, and for the purpose of assisting in the turning of the starch into sugar.

There is no difference in the yeast used in the beer made from rice and the beer made from barley malt. The brewers' yeast is a micro-organism. We originally have had it and we propagate it by fermentation. It is the yeast added to the wort solution and allowed to ferment. During the fermentation it multiplies itself and propagates. There are various processes of making beer. Each brewer is apt to have in his own process of manufacture certain peculiarities different from others, as to temperature, and many other little details of that kind. Some brewers have pure yeast apparatus to
198 cultivate pure yeast, and some cultivate it where they ferment it, in the fermenting cellar. Some have open and others have closed fermenters. The closed fermenters guard more against contamination.

I do not know of any process of fermentation resembling the sake process of fermentation. Spontaneous fermentation is decomposition without the aid of yeast. Fermentation with the aid of cultured yeast is characteristic of the brewing process. If it is a culture of yeast of saccharomyces cerevisiae type, it is a brewing process. The brewers' yeast is kept in large quantities, the entire batch being known as stock yeast, or brewers' yeast. From this stock of yeast the yeast is taken from time to time to aid in the fermentation. If yeast is taken from the stock yeast of the brewers, it is a brewing process.

I know nothing of the process of manufacturing sake, other than the knowledge gained from the reading of the record in the Nishimiya case. The only time I tasted sake was when it was presented to me by Government counsel in this case.

Redirect examination:

I could take sugar and saccharomyces yeast and ferment it, but it would not necessarily be a brewing process. By brewing process we mean the process as I described before in the brewing business. Saccharomyces cerevisiae is known as brewers' yeast.

The simple operation of taking a portion of stock yeast to cause a fermentation with the germ solution would not necessarily make it a brewing process. Referring to the process of making sake as
199 described in the Nishimiya record, I do not think that there is any similarity to the process of brewing. I have never

heard of beer being made from rice without the use of malt. When I spoke of beer made from rice I did not mean to be understood as speaking of beer made from rice only. We use barley in the malting process in the initial stage. Rice is used after the barley has been germinated and turned into malt.

Recross-examination:

I have never tasted anything like sake before.

Redirect examination:

I have tasted something that had some similarity to it; that is sherry.

ROBERT WAHL, witness for the Government, testified:

Direct examination:

I am President of the Wahl-Henius Institute of Fermentology, 327 Fullerton Avenue, Chicago. The business of the Institution is to examine and analyze materials employed in the production of zymotechnic industries and the intermediate and finished products from these materials, and to educate students in the scientific principles underlying the operations carried out in the different zymotechnic industries, with a view of enabling them to take positions as foremen or superintendents in such industrial establishments. I took a course in technical chemistry at the Hanoverian Polytechnic High School in Germany, covering a period of three and one-half years, and I took my degree as Doctor of Philosophy in Marburg, Germany, after studying chemistry there for one year and
200 one-half more. From 1880 to 1885 I was engaged in experiments relative to the clarification of beer, while chemist and superintendent at the Wahl Glue Works of Chicago, and then took a special course in laboratory work pertaining to the analysis of brewing materials and products at Berlin, Germany, and a special course in biology or micology with Prof. Joergensen, of Copenhagen.

I am familiar with the method of producing wines. A course for wine makers was given last year at our institute. The particular branch relating to the taste and general characteristics of various wines was covered by myself, during a course of lectures on wine making. I am able to distinguish by their taste, color, and flavor most of the characteristic wines produced.

I have seen and tasted sake, and am familiar with the process of producing sake through the literature on the subject, which is quite extensive.

I have tasted sake probably half a dozen times. Comparing this sake in evidence here with the taste and flavor and general characteristics of spirituous beverages, including beers, wines and liquors, I would say that the beverage most closely resembles a wine of the type of a dry sherry. I have included ales and porters under the designation beers. In my estimation, the flavor of this product resembles that of sherry more than it does that of any other wine

known to me. It is especially by the flavor of wines that the different types may be recognized. The flavor is distinctly different from that of Rhine wines, or Moselle wines or Bordeaux or Burgundy wines. The taste of sake is not sweet, showing or in-
201 dicating a small sugar content, while it is somewhat tart, indicating a distinct degree of acidity like that of all wines, especially, however, those dry types which contain but little sugar. The color of this sake also resembles some kinds of sherry wines, especially before they have been aged in the wood. The effect of the sake on the palate is that of a strongly spirituous product, as is also its effect on the body, being in this respect more like that of a strongly alcoholic wine than of a mild alcoholic wine. Sherry has a high alcoholic content, which distinguishes it in its effect on the human body when taken internally from lighter wines of approximately the same color, like Moselle wines or the lighter Rhine wines.

I have read the record in the case of United States v. Nishimiya. I don't know particularly if the flavor of sake is due to the mold fungus, aspergillus oryzae, but we know that in wine production a mold growing and spreading over the ripe grape has considerable influence in shaping the flavor of the finished product. The finest German Rhine and Moselle wines are called "auslese weine" which means produced from selected grapes, the selection being made to separate the grapes or berries that have this fungus growth spread over them, from those which have not. Those with the fungus are used in the production of wine. In the production of ales that are termed "musty" ales a fungus growth in the cellars in which the ales are stored is thought to give the ale a peculiar flavor. It would be considered a grave mistake to allow the grain to mold prior to the making of beers or ales.

The color of sake resembles the color of some types of
202 beers, pale Bohemian, for instance, and the English pale ale. As to flavor, it is distinctly different from any beer I have ever tasted, all beers having a malt and hop flavor in more or less pronounced degree, which is entirely absent in the product before me. As to degree of tartness, it somewhat resembles in this respect a very old ale. In its effect on the system I could almost immediately, by getting a few drops on my palate, tell it was a much stronger alcoholic beverage than any beer I have ever tasted. There remain, therefore, as points of similarity with some beers, the light color and the degree of tartness, which is characteristic only of certain types of ale.

In the production of beer, cereals, usually barley, are employed. In conjunction with barley, rice and corn are used in some countries. The barley is always employed in the malted condition; the other cereals, like rice and corn in the unmalted condition. In the production of wine, ripe grapes furnish the material. In so fas as the material employed in the production of these different beverages is concerned, sake must be considered nearer that of beer-making, with this essential difference, however, that in the manufacture of beer, malt is considered to be absolutely necessary, whereas in the

production of sake, the cereal employed, that is, rice, is not malted, and that in the production of beer, hops are considered necessary to give it its distinctive character as at present recognized in the old countries as well as in America.

In the production of sake there is no real brewing process, as it is commonly understood with brewers, only the process of mashing resembling somewhat that employed by the brewer in mix-
203 ing his malt in the mash tun or tub. The processes of straining the liquor after mashing, of boiling the liquor, of cooling it, are wanting in the preparation of sake.

The fermentation process more closely resembles that employed in wine production, with this difference, that in the production of wine the yeast is introduced accidentally through contact of the grape juice with the air, and the yeast on the skins of the grapes finds ready-formed sugar. The fermentation therefore is carried out more rapidly than in the case of sake, where the introduced ferment, which is analogous to the wild yeast used in wine-making, does not find ready-formed sugar, but must wait for the inversion of the starch of the rice through the ferment or enzyme contained in the mold fungus.

In the brewing trade the term "malt" implies a product obtained through a germinating process of a cereal; in the production of the so-called "Moyashi" or "Koji" which is prepared by inoculating cooked and cooled rice with the spores of the fungus aspergillus oryzae and developing the aspergillus mold, the product is not germinated; in fact, the germ of the rice was destroyed through the cooking process. This whole process of preparing "Koji" is undertaken in order to obtain the substance known by its effect upon the starch of the cereal, its power being to invert, under certain conditions, the starch of sugar. "Koji" not being a germinated grain, cannot therefore be considered a malted product.

(Objected to on ground that witness is not an expert on sake making. Objection overruled. Exception.)

204 This so-called yeast (referred to in the Nishimiya record) is in so much a yeast as the product has been obtained in such a way as to secure yeast cells and their multiplication on the rice out of the surrounding air, or substances with which the rice has come into contact during the preparation of this so-called yeast, better known to me by the term "Moto," which is a recognized and familiar product in the literature of sake. This "Moto" cannot be considered in the same sense a yeast as the brewers' yeast since the latter consists largely or mainly of yeast cells with some beer interlocked within the yeast cells; whereas "Moto" consists mainly of rice with wild yeast cells, adhering thereto and overspread by fungus growth. These cells are wild yeast, that is, the ferment contained in this "Moto" which produces the fermentation is wild yeast, and is recognized as such generally by scientists at the present time. Wine may be made with wild yeast, or with cultured yeast. The general practice is still to employ the yeast that adheres to the skins of the grapes or is introduced into the pressed juice by contact with the atmosphere.

The pure culture wine yeast is obtained from the same wild yeast; it is a progeny of the natural wild yeast, and therefore has all its characteristic properties. The difference between cultured wine yeast and wild wine yeast is that the wild yeast which promiscuously finds its way into the grape juice is composed of a number of species, whereas by using cultured yeast the kind of species on which the result or quality of the wine largely depends, is controlled. Sake yeast, from the description in the Nishimiya record, is necessarily wild yeast.

205 The yeast used in the production of the Standard European and American beers is not a wild yeast. However, in the city of Brussels, Belgium, a product is made which is called beer, the fermentation in the preparation of which is called a spontaneous one, since no yeast is added. Here we have, therefore, also a wild yeast fermentation. I do not know of any beer, aside from that which I have mentioned, which is produced from wild yeast.

I would say that Exhibit 3 (Jimenez & Lamothe) is a dry sherry. There is a resemblance between that and sake (Exhibit 2). I would regard as the better product the Jimenez & Lamothe. The resemblance between these two products, sake and Jimenez & Lamothe, is so great that I would have pronounced the sake product a dry sherry unhesitatingly had I not known or imagined its origin.

The character of the product Duff Gordon sherry is also that of a dry sherry, and there is as much resemblance between it and sake as I find in different brands of dry sherry. The Duff Gordon and the Jimenez & Lamothe sherries more closely resemble one another, in point of flavor, especially, than either of the two resemble the sake.

Cross-examination:

I have never seen sake made. When I used the term "spirituous beverages" I referred simply to alcoholic beverages.

The taste of sake indicated a small sugar content. It differs from the taste of so-called sweet wines, but not from the taste of so-called dry wines.

One brand of Schlitz beer which is called "Extra Pale" or "Pale Extra," is, if I recollect correctly, approximately the color of
206 this product before me, while the palest product of the Anheuser-Busch Brewing Co., may be somewhat darker than this sake. The other brands of the Schlitz brewery, as well as of the Anheuser-Busch brewery are darker in color.

The number of red wines goes into the hundreds.

I agree with the statement of Dr. Wiley, the government chemist, that the taste of a beverage depends chiefly upon the kind of yeast employed in making it; also upon the temperature which has been used in the process of manufacture, and the nature of the raw material from which it is made. But I would regard various steps in the different processes of manufacture of a beverage, like that of mashing, boiling and cooking, and chip-cask treatment in the case of beer, as well as the condition under which the aging took place in the case of ale and stout, the treatment of the grapes, whether fermented with or without the skins or pomace, likewise as important factors in establishing the taste or flavor of the finished product.

The amount of alcohol in wines varies from about 9 per cent by volume to about 16 per cent., for such wines as have not been fortified by the addition of spirits. The highest per centage of alcohol found in ale in our institute was, approximately 8 per cent. by volume. There is no reason why higher percentage could not be obtained, if desired.

The nature of the yeast used in converting the sugar into alcohol is an important element in the resulting taste. One of the yeasts in wine is saccharomyces pasteurianus; another is saccharomyces ellipsoideus. The scientific name of the yeast used in making
207 beer is saccharomyces cerevisiae. The wine yeast is a totally different species from the beer yeast.

The product described in the Nishimiya record under the head "Moyashi" is not a malt, but it is in this respect similar to malt, that through the growth of the fungus on the cooked rice an enzyme is produced, which will invert the starch of the grain or rice. In malt, however, there is another enzyme produced during the growth of the germ, which is called peptis, which has the important function of modifying the albumenoids contained in the barley in such a way that they become soluble. These albumenoids enter into the composition of the beer and give the beer what is termed its palate fulness; and that is one of the reasons of the great dissimilarity of taste between beers and wines, in that wines generally do not contain albumenoid substances.

Comparing the process of production of malt from grain with that of the production of "Moyashi" or "Koji" from the cooked rice, a fungus growth, I see no comparison in the various steps taken. In fact, the processes are almost as dissimilar as they can be.

"Moto" resembles malt in the one particular, that it contains diastase, and in another particular, that it contains starch. I would not say that "Moto" was a malt, but that it was similar to malt in the two particulars mentioned. "Moto" could not be used in the place of malt for any purpose that malt is employed; therefore I could not put the two into the same class. The function of malt is to convert the starch into sugar and the albumenoids into peptones. The purpose of "Moto" is also for the purpose of converting starch
208 into sugar. The functions of the two are the same in one particular; in another they are widely different. They are the same in that "Moto" contains diastase, the function of which is to invert the starch.

"Koji" is a substance produced by spreading spores of the fungus aspergillus oryzae on cooked and cooled rice, and allowing these spores to grow into fungus. After sufficient growth has been obtained the product is termed "Koji."

In tasting the sake and the two samples of sherry at the hearing this morning, I noticed a peculiar and distinctive flavor which sake has. The rice is cooked when used to make beer. There is no germination of the rice in beer manufacture. The barley used in the making of the malt in beer manufacture is permitted to sprout and germinate. The mode of growth between fungus and germ is entirely different.

Redirect examination:

The percentage of alcohol in fortified wines runs from the point of natural alcoholic capacity possible by the specific yeast employed, which is from about 12 per cent. to 16 per cent., to usually 20 per cent. to 24 per cent. In America the average content of alcohol in beers is in the neighborhood of 4 per cent. The purpose of cooking of the rice in making beer is so to modify the starch that it becomes readily convertible by the diastase produced through germination of the barley.

Most wines have their peculiar flavor so that they become identifiable through this characteristic alone. I doubt that I have made the statement that this sake here in evidence and the sherry have a similar flavor; on the contrary, I note the two wines show a difference in this respect. What I meant was that the flavor was
209 a sherry-like flavor, as were also the flavors of the other two products. This sherry-like flavor appears to me to be ascribable chiefly to the type of yeast employed in the fermentation, combined with the high alcoholic content of the products, which tends to bring out the flavors of the wine in a more marked degree than in products with lower alcoholic content.

Recross-examination:

I am not able to define the difference in point of flavor between the sake and the two samples of sherry wine before me excepting to say that there is a marked difference in the flavor, in all cases a sherry flavor being noticeable.

The highest alcoholic strength of any ale which I have tasted was eight and one-half per cent. by volumes. The name of that ale is Bass ale. There are a number of others with such a percentage. Those ales did not taste like wine, they had a distinctly ale taste and flavor. The lowest alcoholic strength in wines that I have tasted was in the neighborhood of 9 per cent; 8½ per cent. to 9 per cent.

CORNELIUS SIPPEL, witness for the Government, testified:

Direct examination:

I am superintendent and brewmaster for the Peter Schoenhofen Brewing Company. Ours is the largest brewery in Chicago, and I think the seventh or eighth largest in the United States. I have been connected with that brewery for eight years. Prior to that time I was brewmaster for seven years for the West Side Brewery
210 Company in this city and prior to that I was brewmaster for the Aurora Brewing Co., of Aurora, Ill., for 15 months. I am familiar with the taste and general attributes of the products of the various breweries with which I have been connected, and I am familiar with the tastes and attributes of beers generally. I have had experience in beers in Germany, where I learned my trade working as assistant brewer in various breweries.

I saw an article similar to this sake about six weeks ago when Mr. Levett called at our brewery. Prior to that time I did not know

what it was. I examined it and I thought it was a kind of wine or liquor. There is no similarity in my opinion between that article and beer. It is a liquid that contains considerable more alcohol; it looks to me that it is to be classed more like a heavy wine than anything else.

I do not know any beers, ales or porters that do not contain carbonic acid gas in their marketable state. The highest percentage of alcohol in our beers is about 6 per cent. in one kind, called a malt extract. Lager beer produced in our brewery averages about 4 per cent. of alcohol. The average percentage of alcohol in breweries that I have been connected with has been from 3½ to 4½ per cent.

I have read the description of the process of making sake contained in the record in the Nishimiya case. The process described under the head of "Malt" or "Moyashi," in my opinion is not a malting process because they cook the rice and add this fungus mould to it. We don't have to add any enzymes or anything else to produce malt, as it will be produced by its own nature, or contents of the
211 different kinds of substances contained in the barley. You cannot produce malt from cooked rice. Referring to the whole process as described in the Nishimiya record I will state that I do not consider that a brewing process.

I don't know whether you can exactly call this a brewing process, because the way we brew beer is entirely different from the way sake is produced. Of course, this mould that I refer to has a tendency to invert the starch into sugar, and then later on the sugar into alcohol again. So in my opinion this is an entirely different process from the method employed in the brewing industry.

I use rice in making beer. We do not malt the rice; it is cooked before it is used. That is to modify the starch, to convert the starch into soluble starch so that it can be converted by the diastase which is contained in the malt into sugar.

Malt is the product of barley grain; it is produced by steeping for a number of hours with cold water at a certain temperature; then it is spread on the floor, or in the automatic malt houses in compartments and allowed to germinate from four to eight days, and during that process an enzyme is produced, which we call diastase, and also peptones. We must have this diastase as well as peptone to convert the starch into sugar, and also the albumenoids contained in the barley into soluble albumenoids. After this malt is taken up it has a certain percentage of moisture, and it would not keep for a long time, so we have to put it in a dry kiln and dry it for a certain
212 number of hours and store it in the elevators, which will keep it for years, and it is used whenever we need it.

Mould on grain in the making of beer would have a very bad effect. No germ is added to the barley to produce malt.

Cross-examination:

Rice used in making beer is cooked, and not malted, therefore the process of making sake, at least in so far as the rice is first cooked and is not malted, is not like the process of making beer. Those steps are not the same that have been enumerated. It is true that in

the making of beer and sake both the rice is cooked, and that the rice is not malted; that is true in the making of beer.

The processes are to this extent similar. Of course, we know that the starch is converted into sugar with this fungus mould. Our diastase in the malt does the same thing, but whether it converts the starch into the same kind of sugar as with this fungus mould as it does with diastase, I don't know. But you get sugar solution in both cases. I do not think the Nishimiya record contains any parts which resemble brewing processes. There is only one way of brewing lager beer. The only difference is some employ a different temperature in mashing.

I have never tasted anything exactly like sake. It has a peculiar aroma. It has a kind of oriental taste. I would say it was of rather a peculiar distinctive nature of its own, but I have drunk some other wines which are somewhat as near as this, only the flavor varies somewhat.

213 FRITZ BOCK, a witness for the Government, testified:

Direct examination:

I am superintendent of the Pabst Brewing Co., in Milwaukee. They manufacture only lager beer and over a million barrels a year. We are one of the largest three breweries in the United States. I have been in charge of the brewery for the last three years. I was assistant for a period of five years and virtually since 1883. I have been a brewer all my life, since 1878. I have charge of the manufacturing part and have to see that the brewing process is carried on properly under my direction, and the manufacture of malt; I have to see that our products leave the brewery in proper shape. It has been necessary in my business to become thoroughly familiar with the taste and attributes of beer generally. I have to differentiate between different brands of beer, taste and examine them.

I have tasted sake. There is no similarity between sake and any beer that I know. It is an entirely different thing from beer.

I do not know of any beers that do not contain carbonic acid gas. Beer has to contain carbonic acid gas. The percentage of alcohol in beer is from 3½ per cent and the utmost is seven per cent. Seven per cent is the highest percentage I have ever run across in beers.

The taste of sake is entirely different from the taste of beer.

Barley is converted into malt by a process. We simply have to change our barley into malt in order to be able to get a product which enables us to mash it afterward, to convert the starchy parts
214 of the malt into sugar, dextrine. The malting process is a growing process, the same process as the kernel undergoes in nature, but we stop that at a certain time, by killing it. The object of malting is to produce diastase. The malting process makes the insoluble albumenoids contained in the barley soluble ones.

I have read the process of making sake as described in the case of the United States v. Nishimiya. The process described in that case is not a malting process, as the term is understood in the brewing trade. The rice is cooked in manufacturing sake and then it is

exposed to some germs from the air which have got nothing to do with the malting. In malting, barley in the original state has to be steeped and grown and then the process is terminated by killing it so that it has got no relation to this way. We could not produce malt from a grain that had been cooked; it has got to be in its natural state. We try to prevent mold as much as possible because it would spoil our goods.

The whole process of making sake as described in the Nishimiya record is not a brewing process, because it is entirely different. It is not similar to the brewing process.

I know of no beers that can be made without hops. Hops are essential to beers. I do not know of any beers that can be produced by obtaining a malt extract and then adding yeast.

We try to prevent mold growing on barley as much as possible because it would spoil our goods. A very little part of the diastase which converts the starch into sugar in making beer is found in barley itself, but not sufficient for our purposes. Rice is used, in
215 some instances, in making beer. It is not malted, it is cooked and added to the beer in the malt mash, that is, after the malt extract has been taken from the malt. In my opinion beer could not be produced by subjecting any grain to the process described as the process of making sake.

Cross-examination:

I do not know whether diastase is found in rice nor whether the rice is capable of being malted. My duties are as brewmaster to superintend the preparation of the grain. The presence of maltose would decidedly indicate a malting was used in the process of manufacture.

This is the second time I have tasted sake. I noticed a peculiar flavor or aroma in the sake. Sake is a beverage that is entirely strange to me. I thought it was strange to me when I tasted it.

Yeast is added to beer after the liquid is drawn and cooked with hops and cooled down. Maltose cannot be produced without the use of malt. Maltose can be produced from any starchy article. The starchy article would not have to be malted to produce maltose if you have diastase.

ALFRED UHLEIN, witness for the Government, testified:

Direct examination:

I am superintendent of the Schlitz Brewing Co. I have been assistant superintendent or superintendent for the last 24 years and connected with the brewery 30 years. The Schlitz Brewing
216 Company I think is one of the three largest in the United States. It has become necessary for me in the course of the business to become thoroughly familiar with the taste and attributes of beer generally.

The percentage of alcohol generally found in beers is from 3½ to 4 per cent. The highest percentage of alcohol which I have found I was told was 6 or 7 per cent, but I never tested it.

We mash our malt at a certain temperature and then take the extract of the malt and boil it with hops and then this liquid called wort is cooled to a certain temperature and brought in the cellar and goes into a fermenting tub and is pitched with pure cultured yeast. After the first fermentation it is pumped into a storage cellar. It remains there for a certain time to age and ripen, and is then filled into a cask or barrel. The wort when it is pitched with yeast or extract, is changed into alcohol, carbonic acid gas and yeast, and the remainder is beer.

I have read the process of making sake as given in the record in the Nishimiya case. I do not consider the process as described under the head of "malting" to be a malting process because the barley malted is soaked and sprouted and then kiln dried. In the sake process the rice is only steeped and heated and some fungus acts as a converter. In the process of malting the albuminoids are converted from an insoluble state to a soluble state.

We have used some rice in making beer. It is never malted. It is added after we make our malt. In the rice mash the starch of the rice is converted into sugar by adding malt to it. The starch
217 of the rice is not converted into sugar before the barley malt is added to it. Cooked rice could not be converted into a malt, because the growth of barley is only at a certain temperature and if you cooked barley you could not make malt out of it; you kill the germinating energy.

We avoid as much as possible to have any mold anywhere.

Taking the whole course of making sake as described in the Nishimiya record, I would not describe that as a brewing process. I do not consider it at all similar to the brewing process. It is not malted to our knowledge as barley malt is; then it is not like beer, it contains no carbonic acid gas, it has no hops.

I have never heard of beer being made without hops. I do not know of any beer that doesn't contain carbonic acid gas in its completed condition. I do not know of any ale or porter that does not contain carbonic acid gas. It would not be possible, in my opinion, to produce beer by a process similar to the process of making sake in the Nishimiya record.

I have examined sake. I first saw it when Government counsel was at my office. I do not find any points of similarity between sake and any beer that I know of. Points of dissimilarity between sake and beer are, sake has no hop taste, no carbonic acid gas, and it is very rich in alcohol.

Carbonic acid gas in beer is considered an important factor. Without carbonic acid gas beer tastes flat and customers don't like it. Ale has carbonic acid gas to a certain amount. There is no resemblance between the odor of sake and the odor of beer. I do not find any malt odor in sake; nor any hop odor.

218 The yeast used in making beer is not a product of barley. It is obtained from fungus in the air. At the present time the yeast used in making beer is obtained from the fungus cultivated and cultured and the yeast in the brew is drawn after the first fermentation. Cultured yeast is from a single cell cultivated and

built up and has the quality of giving the same attenuation, and the same product under the same conditions.

Cross-examination:

I have no other knowledge of sake making than that obtained from reading the Nishimiya record.

I do not consider sake a beverage. I consider that only beer, ale or porter are fermented beverages. I would not call wine a beverage; I would call it just wine.

Maltose is a result of the malting process. The presence of maltose in a beverage would indicate that a malting process had been employed, and that malt had been employed.

I notice a large percentage of alcohol in tasting sake. The aroma of sake reminds me somewhat of sherry wine. I am not a wine expert. I use beer chiefly.

Dr. ALFRED SCHEDLER, witness for the Government, testified:

Direct examination:

I am chief chemist at the Pabst Brewing Co. My duties are to analyze the raw material and the products produced. I have been connected with the Pabst Brewing Co. for eleven years and I am in direct contact with all of the stages of the manufacture of malt and beer. It is a part of my work to taste beers and compare their
219 different attributes. I have examined the sample of sake in this case. I saw the article a few weeks ago; I did not know at that time what it was. I formed an opinion prior to being told what it was. I considered it a strong liquor, a strong vinous liquor.

The only points of resemblance between sake and beer are that sake contains alcohol and water and some chemical point similar to beer. And yet I would not say that. The points of dissimilarity between them are the larger amount of alcohol in sake, then its flavor and the lack of carbonic acid gas, and the lack of hops and the flavor and taste. I do not find any similarity between the odor of sake and beer. Of all the beverages that I have come in contact with, sake most nearly resembles some vinous liquor.

I am familiar with fermenting and yeast and have made a special study of the yeast made in production of beer. A certain yeast produces in a particular wine its peculiar flavor. I base that opinion on the experience I had in Darmstadt where I had occasion to examine lots of wine. That examination consisted of the fermenting of grape-juice, the determination of the amount of sugar present, the determination of alcohol and the extract matter of glycerine and of different salts, tartaric salts contained in wine, the acidity, in other words the whole components of wines.

I understand by the term "malt" or "malting" a germinating cereal such as barley or wheat, wherein germination is stopped through heating.

I have read the process of making sake as described in the Nishi-

miya record. The process described under the heading
220 of "Malting" is not in my opinion a malting process, because the material there used is not subjected to the real malting process; the cereal is not subjected to growth. It would not be possible to produce a malt from cooked rice, because the germinating power of the rice is destroyed during the boiling. I do not consider the process described in the Nishimiya record a brewing process or similar to a brewing process. To produce beer it is necessary to use malt. From this you produce the liquid extract which is then boiled with hops and cooled and germinated to yeast. In no case in this sake process is the malted cereal used, nor is the first liquid extract furnished.

I never knew of any beer that did not contain carbonic acid gas in its finished state. I do not know of any beers which are produced without hops.

In my opinion, the peculiar flavor of sake is due to the presence of various organisms.

The highest percentage of alcohol which I have found in beers is up to 6 per cent. and in ales from 3½ to 4 per cent. depending on how strong they are brewed. Maltose can be produced without the use of the malting process. The chemist Fisher in Berlin has produced maltose synthetically. In the malting process the insoluble albumenoids are changed into soluble; some of them are taken out of the barley by sprouts.

Q. Will you state whether the method of treating rice in the Nishimiya record in the making of sake operates to render the albumenoids soluble?

A. They might, I cannot tell. Rice cannot be malted after having been subjected to the steaming process.

221 Cross-examination:

The first time I ever tasted sake was when it was presented to me in this case.

I could not say how sake is composed because I have not analyzed it.

I have no practical knowledge of the making of sake. The first time I tasted sake was when it was presented to me by Government counsel in this case. I have never brewed ale myself. I do not know anything about the brewing of ale except from book knowledge.

My testimony as to taste has been merely as an ordinary drinker and not as an expert.

JOSEPH UIHLEIN, a witness for the Government, testified:

Direct examination:

I am a brewer with the Jos. Schlitz Brewing Co., of Milwaukee, and I have been connected with the brewing business off and on since 1894, when I commenced to learn the trade. During the course of my business it has become necessary for me to become familiar with the taste and attributes generally of beer. I am both a practical and scientific brewer, and can differentiate the flavors of different

beers and their general characteristics. I have studied chemistry and the technology and physiology of fermentation as applied to the brewing business in Copenhagen, Denmark, and Milwaukee.

I have read the process of making sake as described in the Nishimiya record. It is not a malting process in my opinion. When barley is malted it is first steeped for a certain number of hours until the proper degree of moisture is contained in the barley.

222 Then by various processes the steeped barley is malted, and in this malting process of 6 or 8 days it undergoes a nitrogenous fermentation without which no malting can be produced in steeped grain. The object of malting is to convert the starch in the kernel to soluble carbohydrates, of the cane and grape sugar groups. There are over 70 of these compounds. In the malting process one of the essential features is to keep the malt free from mold and bacteria. In the sake process, molds are added to the rice which gives off invertine, which is the source of fermentation in sake. All molds, yeast cells, yeast varieties and bacteria that cause fermentation, do not cause fermentation as such molds, bacteria or yeast, but cause fermentation simply because of the fact that as soon as the cells come in contact with a nutriment solution or nourishment of any kind, a certain substance comes off as invertine, oozes from the cell wall, attacks the carbo-hydrates and causes fermentation. In beer the yeast is added in the fermenting cellar, where invertine attacks the carbo-hydrates and that makes the carbonic acid gas and alcohol.

In the case of the mold in rice the rice acts as a nutriment, and the molds multiply after feeding on the nutriment, and in its growth gives off invertine which causes the fermentation. Under the process as described in the Nishimiya case there cannot be a nitrogenous ferment.

Beer without carbonic acid gas would not only be flat, but would be unsalable in any market in this country, or on the continent of Europe. Beer without carbonic acid gas is unknown.

223 Cooked rice could not be malted because the germ is killed in the cooking process. Rice in the Nishimiya process could not be malted under any circumstances, because the account of the process states that 25 per cent. of the various kernels are ground down, which would positively preclude a germinating process, and without a germinating process there could be no nitrogenous fermenting to change the starch into soluble carbo-hydrates.

Maltose could be produced without a malting process. I don't know how it could be produced without a malting process, but it is a fact that there are some 72 carbo-hydrates in the cane and grape sugar groups and maltose is frequently found in these carbo-hydrates without there having been a malting process. Maltose is sometimes found in sugar which is not produced from malted grain.

There seems to be no similarity whatever between sake and any beer I know. The chief characteristics of beer are a pronounced malt flavor and a hop flavor and carbonic acid gas. These characteristics are not present in sake. Furthermore, the alcoholic pungency of sake is quite different from the alcoholic taste in beer.

Cross-examination:

There is no nitrogenous fermentation in the rice as used in making beer. I said that was also the fact in making sake so far as I have seen from reading the Nishimiya record. The rice added to beer is not supposed to be malted, and there is no intention in adding it to beer that there should have been a nitrogenous fermentation.

In the manufacture of malt, the malt undergoes a nitrogenous
224 fermentation, but the rice is added simply to give the beer more stability for shipping purposes. All I know of sake making is derived from the Nishimiya record. The process is entirely new to me. The first time I ever tasted sake was several weeks ago.

WILLIAM KREIGER, witness for the Government, testified:

Direct examination:

I am a brewer and malster at the Anheuser-Busch Brewery in St. Louis. I have been assistant superintendent for four years, and prior to that I was head malster at the same brewery. I have been connected with that brewery for twenty-four years. Before that I was brewer for Moerlein in Cincinnati and Isaac Leisy in Cleveland. The Anheuser-Busch brewery is the largest brewery in this country.

I am familiar with the term "malting" as used in brewing. There is no germ or seed added to the barley to produce malting.

I have read the process of making sake as described in the Court Record, in the case of United States v. Nishimiya. I do not consider the process described under the head of "Malting" (Moyashi) a malting process. I do not consider the whole process of making sake as described in the Nishimiya record a brewing process, because it is entirely different. It is not at all similar to any brewing process that I know of. I don't believe beer could be made by the process described in that record.

I have examined the sample of sake. It differs from beer in that it does not taste like beer at all, it tastes more like liquor.
225 All beers contain carbonic acid gas. The highest percentage of alcohol in beers produced at our brewery is about four per cent. I find no resemblance in odor between sake and beer. I do not find any resemblance in taste.

I do not know of any beers which could be made without hops or without obtaining malt extract and then adding yeast. Brewer's yeast used in making beers is not a production of barley. In our brewery we use rice in making beers. Rice is added in the mashing process, after the barley has been malted. Rice is cooked before being used. It is not malted. I have never known rice to be malted.

Cross-examination:

I first tasted sake to-day. I have never seen it made. The Nishimiya record is the only thing I have read about sake. I never knew or heard anything before about sake. I notice a peculiar oriental flavor to it. That flavor, that taste, stays with me for a length of

time. It is differnt from anything that I ever drank. At least, there is a difference from beer. I do not consider ale a liquor.

Rice is boiled in the making of beer. I have read in the Nishimiya record the descriptions of the process of making sake, and have noted that there is a similar thing done. Brewers' yeast is the substance that makes beer ferment. It is yellowish. They first get it started, and it forms itself again. Yeast is taken from what is left over from the previous brew, for the next succeeding brew. I notice that in the sake process as described in the Nishimiya record, there was a yeast mass used, similar to the brewing yeast. But
226 there is no similarity in that respect in the process of malting sake as described in the Nishimiya record to the process of malting beer.

I don't believe you can get anything similar to beer out of the sake process. It may be something like that, but I don't think you could make beer out of it. It is not similar to it even.

Redirect examination:

It is necessary in my business for me to become thoroughly familiar with the tasting and characteristics of beer. The yeast described in the Nishimiya record, differs from the yeast used in the making of beer, in that they seem to make it mould and kind of decompose, whereas ours is kept as clear and clean as possible.

H. August Huxicke, witness for the Government, testified:

Direct examination:

I am a chemist at the Anheuser-Busch Brewery, thoroughly familiar with the process of brewing beers and have been connected with the brewing of beers for that brewery for a little over seven years. Prior to that time I had no experience in fermentology or allied subjects except as Professor of Applied Chemistry at the Washington University for four years. I taught fermentation at that time. The subject of yeast was part of the course.

I am familiar with the term "malt" or "malting" as used in the manufacture of beer.

I have read the descriptions of the process of making sake as contained in the Nishimiya record. Comparing the process de-
227 scribed under the head of "Malt (Moyashi)" with the process of malting as it is understood in the brewing business, I would say there is a fundamental difference in that the source of vital action in the case of barley malt lies in the germ of the grain, and the result of this vital action produces certain agents which affect the adjoining mass of starch; in the case of sake, the change sought is of course also brought about by the vital action of some plant, but the agent produced from that vital action is exterior to the grain which is being "malted," if that term may be applied to this process. In the natural transformation which the germ undergoes in the case of barley malt, there are certain substances or agents formed, which are perhaps the most important elements sought in the process of malting as practiced in the brewing industry, and their prime pur-

pose is to convert the starch into fermentable sugar. I can speak only in a general way as to the result of sowing a fungus on steam cooked rice, of the kind described in the Nishimiya record, because there are a great variety of fungi, and the exudations resulting from their development may develop under varying conditions. However in this case apparently there is an agent or an enzyme produced, which evidently has the property of converting starch into fermentable sugar. Taking the whole process, as described in the Nishimiya record, for the making of sake, I do not consider that to be a brewing process, because taking the broadest conception of the expression "brewing," it may be subdivided into three distinct operations: malting, mashing, fermentation. The mashing is the usual and more restricted use of the term "brewing." In the sake
228 process the nearest approximation is the process of malting and mashing, which seems to coalesce some way. The operation seems to go on more or less simultaneously; that is, the formation of the enzyme, the equivalent of the diastase in malt, and the saccharification of the starch into fermentable sugars. I would not consider the conversion of the starch of a grain into sugar, brought about by the sowing of an extraneous fungus germ on a cooked material, as a malting process.

I have examined the sake sample in this case, and I see no close similarity whatever between that (sake) and any beer that I know. It is quite free from carbonic acid gas, and neither forms foam or retains foam; so it lacks the viscosity and the necessary elements to retain any foam that may be brought about by agitation of the fluid. The other physical properties in the way of taste and odor it is hardly necessary to dwell upon, because it is so characteristically different from any beer with which I am familiar.

In ordinary lager beers the highest percentage of alcohol is not more than 5 to 6 per cent. In ales, perhaps 7 or 8 per cent. Some porters, and so-called "double beers" run up to 9 per cent.

The first and most distinctive change brought about in the albumenoids of the grain by the process of malting is the formation of a diastase, which is nothing but an albumenoid, and is derived from some other form. Whatever it is, it is a matter of conjecture only; but that change, of some albumenoidal constituent into a diastatic form, is certain to occur and is essential in the process of malting.

There are other changes, more or less peptonizing action, that
229 is, the equivalent of breaking down the more complex albumenoid molecules to the more simple peptonoids, which are water soluble and diffusible.

I infer from the description given in the Nishimiya record, so far as it relates to the preparation of the rice, that the albumenoids are rendered soluble.

It is necessary for me in the course of my work to become familiar with the tastes and characteristics of beers, so as to distinguish one from another. I do not know of any commercial beers that in their finished condition do not contain carbonic acid gas, nor of any ales that don't to some extent. I do not know of any beers or porters that can be made without hops, nor of any beers, ales or porters, that

can be produced without first obtaining a malt extract, and then adding yeast.

There seems to be no apparent similarity between sake yeast and the yeast used in making beer. There is no apparent similarity there at all. From the description contained in the Nishimiya record, the indications are all in favor of the yeast there used being wild yeast, that is, wild in the sense that it is allied to the process of fermentation of wines, either on the fruit itself, in the case of wines, or brought in from the air.

Cross-examination:

The only times I have ever tasted sake was when a sample of it was brought to me directly by the Government representative and to-day. I have never seen it made. There is some diastase present in all farinaceous grains.

An expert tasting this beverage will in an instant class it as an alcoholic liquid. He will go further than that, and classify
230 the percentage of alcohol by the taste. I classified it at once, as belonging to the type of fortified wines, as far as the percentage of alcohol goes.

Spontaneous fermentation would be one that is induced by the presence of a germ already present in the surroundings that enter the process of fermentation; I mean the fermentation induced without the addition of a known agent. The brewing of beer is not by a spontaneous fermentation for the reason that the yeast is added. The fact that it is cultured has nothing to do with it. It is added. That defines it.

If yeast is added from an outside source, for example from the stock yeast, or from the yeast remaining from a previous brew, then the fermentation produced with the aid of such yeast is entirely different from spontaneous fermentation. That is one of the essential differences between wine fermentation and beer fermentation. The method of manufacture would have a very material influence upon the nature of the resultant beverage. If there are two beverages produced by essentially different processes, the resultant beverages must be essentially different in character and nature. The material used is also a very important determining element. A beverage produced from a raw material of one kind would differ very considerably in its final character from a beverage produced from a raw material of an entirely different kind. Under the circumstances, I should say the only justification for applying the word "malting" in this case (described in the Nishimiya record) is for want of another word for expressing a process preliminary to the fermentation process. That is the only justification I can see for the use of the word "malting" here.

231 There is a preliminary process in the sake making, as described in the Nishimiya record, which only partially corresponds to the malting process in beer making. It corresponds as though you were to throw your malting and mashing together; as though you did not discriminate there, and so in that sense it is a partial equivalent. Such preliminary step is essential to the later

fermentation. That is due to the fact that the beverage is made from a grain containing starch. In producing a beverage from a substance which did not contain starch, it would be fermentable without previous treatment.

By reason of the presence of such preliminary step in fermentation, and its necessity by reason of the nature of the raw material used, there is a similarity between the process of sake making and of brewing beer, from the standpoint of a starch chemist. That such preliminary step in the fermenting is necessary in beer making, and is absent in wine making, is a very essential difference between wine making and beer making. That stage of the process of fermentation has a very material effect upon the ultimate character and nature of the beverage produced. It necessarily follows that the process of wine making and the process of sake-making are essentially different, having in mind the material employed and the presence of this stage of the process.

It develops in that very step, the conversion of the amylaceous substances into fermentable products.

In the early stage where the conversion of the starch takes place the difference between temperatures employed in sake and
232 beer making is very characteristic. Evidently the conversion takes place at a very much higher temperature in the sake, while in the malting process we avoid high temperatures for various reasons. In this description of sake making in the Nishimiya record, the temperatures may be approximately the same as those used in beer making, in the mashing process; that is, in that end of the process where the conversion of starch into sugar takes place. Apparently there is a similarity in the range of temperature. There could not be much otherwise. The temperature used in wine-making cannot be as high, because there would be immature fermentation.

In the wine-making process the two elements of malting and mashing are wanting, so practical wine making is limited to fermentation, which, of course, is done at a lower temperature. Wine making does not require any artificially effected heat. A difference of one degree, and of two degrees, will change the type of beer. We adhere strictly to our temperatures, in producing definite results, in the mashing process.

The lowest alcohol percentage of wines goes down to three and even two per cent. I know of porters, what the Germans call "double beer," that are as high as eight or nine, or nine and a half per cent. perhaps.

I noticed a peculiar flavor to this sake characteristic of that and nothing else I have ever tasted. I have drunk wines and think I have tasted most everything that is of interest, but I do not use anything like that regularly.

Redirect examination:

In the description given of the process of making sake fer-
233 mentation can hardly be said to be spontaneous, because mould is added in one case, and the yeast element which is

used is taken up from a previous operation. I am familiar but only in a general way with the process of making whiskey. I know it is made from malted grain. There is a mashing process in making whiskey. The first stages are very similar in the case of whiskey and beer, as they are in the case of sake and beer. The process of making sake is not near to either the process of beer or whiskey making, because in that first stage it differs in the same sense from both the whiskey and the beer. In the fermentation of sake the yeast seems to be added as coming from a previous operation. In the case of wine, the yeast is derived from the grape probably, in a large measure, and is already in the fluid.

The characteristic difference seems to be the high degree of fermentation, differing so materially from anything, either beer or wine. That is a very unusual phenomenon to see fermentation going on to eighteen per cent. of alcohol. I never heard of a yeast doing that. There must be some special condition prevailing there to bring about that change. The temperature in the making of sake is higher, than for other fermentation,—that is, for wine or beer. For beer it is very much lower.

Same witness, called on behalf of Appellees:

Direct examination by Mr. CRANE:

We have no English word which will describe the process of making sake as contained in the Nishimiya record, and there-
234 fore it may, in my mind, be permissible to use the word "brewing," in describing the general process.

Cross-examination by Mr. LEVETT:

The use of the term "brewing" is permissible because the process of making sake goes through the stages of changes of the conversion of a starchy material into a sugar, and then into an alcoholic liquor. In the making of whiskey the process causes the substance used to go through the change of conversion of starch into sugar, and then into an alcoholic liquor. Up to that stage I would say that the process of making whiskey was a brewing process. To the same extent that I call the process of making sake a brewing process, I call the making of whiskey up to the stage of distillation a brewing process.

Redirect examination:

Taking the process of making whiskey as a whole, the fact of distillation essentially distinguishes it from a brewing process.

Oral Opinion.

In the Circuit Court of the United States for the Northern District of California.

Hon. W. W. Morrow, Judge.

In the petition of F. S. STRATTON, collector, for review of decision of the Board of United States General Appraisers, In re "Sake."

The COURT (orally:)

This is an application for the review of a decision of the
235 Board of United States General Appraisers, rendered October 26, 1905, respecting the classification of a Japanese beverage known as "sake," under the customs revenue laws. The article is not mentioned by name in the Tariff Act and the question is whether it is dutiable by similitude either in material, quality, texture or use, under the provisions of section 7 of the Tariff Act of July 24, 1897, (30 Stats. 205) as a still wine containing more than fourteen percentum of absolute alcohol, at fifty cents per gallon, under paragraph 296 of the Act (30 Stats. 174), or as ale or beer otherwise than in bottles or kegs, at twenty cents per gallon, under paragraph 297 of the Act (30 Stats. 174), or whether it is to be classed as a non-enumerated article, under section 6 of the Act (30 Stats. 205).

Texture is defined as relating to the structure of woven fabric and has no quality relating to liquid. The similitude in this case must, therefore, be either in material, quality or use to bring the article in question within the statute.

It appears from the evidence that "sake" is manufactured from rice by a peculiar process of fermentation, and in this respect resembles beer, in being made from a cereal. It appears also that the first stage of this process resembles the manufacture of beer, but the subsequent manipulation of the material is wholly different, and the article itself when ready for use, aside from color, is entirely unlike ale or beer in quality and taste.

The process of fermentation does not resemble that of wine. The alcoholic strength of "sake" is developed from the sugar in the starch contained in the rice, while the alcoholic strength of wine is developed from the sugar contained in the juice of the grape. The
236 process is different and the product is a different material. "Sake" resembles wine in color, as it does beer, but differs in every other respect.

"Sake" is not imported either as wine or beer and the evidence does not show that it is used in place of either. It is distinctly a Japanese beverage, and there is no evidence that those who drink wine or beer as a beverage use "sake" as a substitute. There is some evidence that "sake" has the quality of a poor sherry wine in taste and color, but it does not appear that the wine referred to in the evidence is imported in any quantity to this country or that "sake"

is used for that wine, either in this country or elsewhere. The two beverages are not in competition with each other. "Sake" has a distinct uniform quality of its own, that is to say, all "sake" is alike in color taste, and substance, while wines differ in all their various qualities of color, taste and substance. Wine is made from different kinds of grapes and from grapes grown in different localities. We have, therefore, claret, burgundy, sherry, port, riesling, and various other kinds of wine, made in different localities and from different kinds of fruit, and having different quality, taste, color and substance, while "sake" is uniform in character and in material and unlike any known wine, except the poor quality of sherry referred to in the evidence and produced in court.

Moreover, still wines, if properly handled, improve by age, while "sake", like beer, deteriorates after it has been made a few months. In some of these elements I have mentioned, "sake" resembles beer more than it does wine, but in final comparison in material,
237 quality and use, a substantial resemblance to either wine or beer disappears.

The question was before the Circuit Court for the Southern District of New York in Nishimiya vs. United States, 131 Federal, 650. After considering the various qualities of "sake" as compared with wine and beer, the Court reached the conclusion that it was so radically different from those articles that it should have been classified for duty as a non-enumerated manufactured article, under section 6 of the Act of July 24, 1897. This case was appealed to the Circuit Court of Appeals for the Second Circuit, where the question was further considered, and the decision of the Circuit Court affirmed. United States vs. Nishimiya, 137 Fed. 396.

It is now claimed on behalf of the United States that the evidence in this case distinguishes it from the New York case, but all the elements of difference found in that case have been established in this case.

There is more evidence on both sides in the present case than there was in the Nishimiya case, but I do not find that it has any more weight in establishing a similitude to either wine or beer. The general case presented seems to me to be substantially the same, and the decision of the Circuit Court and Circuit Court of Appeals in the Nishimiya case is entitled to very great respect, if not of binding force upon this Court in the present case. It at least raises
238 a doubt which should be resolved in favor of the importer.

The decision of the Board of United States General Appraisers is affirmed.

[Endorsed:] No. 1361. United States Circuit Court of Appeals for the Ninth Circuit. The United States of America, Appellant, vs. Komada & Co., Appellee. Condensed Transcript of Record. Upon Appeal from the United States Circuit Court, for the Northern District of California. Robert T. Devlin, United States Attorney. Stanley Jackson, Attorney for Appellees. Thomas Fitch, Percy W. Crane, of Counsel for Appellees.

Filed January 13, 1908.

FRANK D. MONCKTON, *Clerk.*

17—220

239 United States Circuit Court of Appeals for the Ninth Circuit.

No. 1361.

THE UNITED STATES OF AMERICA, Appellant,
vs.
KOMADA & Co., Appellee.

Certificate of Clerk U. S. Circuit Court of Appeals to Condensed Transcript of Record.

I, Frank D. Monckton, Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing two hundred and thirty-eight (238) pages, numbered from one (1) to two hundred and thirty-eight (238), inclusive, to be a true copy of the printed Condensed Transcript of Record upon appeal from the United States Circuit Court for the Northern District of California, in the above-entitled case, as the original thereof remains on file and of record in my office.

And I further hereby certify that, pursuant to the stipulation of the counsel for the respective parties therefor, the said Condensed Transcript of Record was, on the 17th day of October, 1907, ordered substituted for the original certified Transcript of Record on file in the above-entitled case and is the Transcript of Record upon
240 which the case was heard in the said Circuit Court of Appeals.

Attest my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 20th day of June, A. D. 1908.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON, *Clerk*.

241 United States Circuit Court of Appeals for the Ninth Circuit

No. 1361.

THE UNITED STATES OF AMERICA, Appellant,
vs.
KOMADA & Co., Appellee.

CONDENSED TRANSCRIPT OF RECORD.

Upon Appeal from the United States Circuit Court for the Northern District of California.

Addenda.

Proceedings Had in the United States Circuit Court of Appeals for the Ninth Circuit.

242 At a stated term, to wit, the October term, A. D. 1907, of the United States Circuit Court of Appeals for the Ninth

Circuit, held at the courtroom, in the City and County of San Francisco, on Thursday, the seventeenth day of October, in the year of our Lord, one thousand nine hundred and seven. Present: The Honorable William B. Gilbert, Circuit Judge; Honorable Erskine M. Ross, Circuit Judge; Honorable William W. Morrow, Circuit Judge.

No. 1361.

THE UNITED STATES OF AMERICA, Appellant,
vs.
KOMADA & CO., Appellee.

Order Substituting Condensed Transcript of Record for Former Transcript of Record.

Upon motion of Mr. Robert T. Devlin, United States Attorney and counsel for the appellant, and pursuant to the stipulation of counsel for the respective parties therefor, it is ordered, that the condensed transcript of record this day filed be and hereby is substituted for the transcript of record now on file in the above-entitled cause.

243 At a stated term, to wit, the October term, A. D. 1907, of the United States Circuit Court of Appeals for the Ninth Circuit, held at the courtroom, in the City and County of San Francisco, on Monday, the third day of February, in the year of our Lord, one thousand nine hundred and eight. Present: The Honorable William B. Gilbert, Circuit Judge; Honorable Erskine M. Ross, Circuit Judge; Honorable John J. De Haven, District Judge.

No. 1361.

THE UNITED STATES OF AMERICA, Appellant,
vs.
KOMADA & CO., Appellee.

Order of Submission.

Ordered, appeal in the above-entitled cause argued by Mr. Robert T. Devlin, United States Attorney, and counsel for the appellant, and Messrs. Stanley Jackson and Thomas Fitch, counsel for the appellee, and submitted to the Court for consideration and decision, with leave to respective counsel to file further briefs 15 x 15.

244 United States Circuit Court of Appeals for the Ninth Circuit.

THE UNITED STATES OF AMERICA, Appellant,
vs.
KOMADA & CO., Appellees.

Opinion United States Circuit Court of Appeals.

Robert T. Devlin, U. S. Attorney, for Appellant.
Stanley Jackson, Attorney for Appellees.
Thomas Fitch, of Counsel for Appellees.

Before Gilbert and Ross, Circuit Judges, and De Haven, District Judge.

DE HAVEN, *District Judge:*

This case is before us on an appeal, by the United States, from a judgment of the United States Circuit Court, for the Northern District of California, affirming the decision of the Board of General Appraisers, as to the amount of import duty to which the Japanese beverage, known as sake, is subject.

The decision of the board of General Appraisers was that sake is dutiable at 20 per cent, ad valorem, as a non-enumerated manufactured article, under Section 6 of the Dingley tariff act of July 24, 1897 (30 St. 151), and the main contention of the Government, on this appeal, is that merchandise of this character is subject to
245 a higher duty as a still wine, by similitude, under section 7, of the act referred to, which provides:

"That each and every imported article, not enumerated in this Act, which is similar, either in material, quality, texture, or the use to which it may be applied, to any article enumerated in this Act as chargeable with duty, shall pay the same rate of duty which is levied on the enumerated article which it most resembles in any of the particulars before mentioned.

* * * * * * * * "

It appears from the record that prior to 1894, sake was classified, by the customs officers at New York, as distilled liquor, and in that year a protest was made against that classification, by an importer; the protestant contending that the article was dutiable as a still wine, by similitude. This protest was sustained by the Board of General Appraisers. In re Woozens, G. A. 2789, T. D. 15392.

The Government acquiesced in this ruling and the classification, fixed thereby, continued, without protest, until March, 1902, when H. Hackfeld & Co., an importer of Honolulu, protested against such classification, claiming "that sake should be assessed for duty as ale, porter or beer, by similitude, at the rate of 40¢ per gallon, if in bottles or jugs, or at 20¢ per gallon, if not in bottles or jugs, or as a non-enumerated article at the rate of 20 per cent ad valorem."

246 This protest was overruled by the Board of General Appraisers (T. D. 24410; G. A. 5334); the Board holding that

sake "should be held to be so far similar to still wine as to be classed as wine by similitude. It is similar in the amount of alcohol and other constituent elements; also in quality, general appearance, and somewhat in taste."

No appeal was taken from this decision; but on April 16, 1903, the collector of customs at New York, having assessed an importation of sake, for duty, at 50¢ per gallon, as a still wine, the importer, W. Nishimiya, filed a protest against the decision. This protest was overruled by the Board of General Appraisers, and the importer appealed to the United States Circuit Court, for the Southern District of New York, and the decision of the Board of General Appraisers was reversed by that Court, and sake held to be dutiable at 20 per cent, ad valorem, as a non-enumerated manufactured article, under section 6, of the tariff act of 1897. (Nishimiya vs. United States, 131 Fed. 650.)

This decision was affirmed by the Circuit Court of Appeals, for the Second Circuit, the Court saying:

"The similarity to still wines, based upon the large amount of alcohol found in the imported merchandise, presents the strongest reason in justification of the collector's classification. * * *

247 But sake has so many characteristics which are not found in either beer or wine, its ingredients are so unusual and the process of its manufacture so unique, that it may fairly be held that it is nowhere described, except by the general language of section 6."

United States vs. Nishimiya, 137 Fed. 396.

In the case now before the Court the collector of customs, at San Francisco, assessed the merchandise, in question, at the same rate as that prescribed for still wines, and upon appeal the Board of General Appraisers reversed this action and held sake to be subject to duty as a non-enumerated manufactured article, under section 6, of the tariff act of 1897.

The United States being dissatisfied with this decision, brought the case before the Circuit Court for the Northern District of California, for review.

The case was heard in that Court upon the evidence adduced before the Board of General Appraisers, and additional evidence submitted by both parties, under section 15, of the act of June 10, 1890 (26 Stat. 138), and the decision of the Board of General Appraisers was affirmed.

1. The question whether a non-enumerated article is similar to one named in the Tariff Act, and for that reason subject to a like duty, is one of fact.

Wills vs. Russell, 100 U. S. 621.
Herman vs. Arthur, 127 U. S. 363.

248 And the findings of the Board of General Appraisers, as to that fact, will not be disturbed, by the Court, unless clearly contrary to the evidence, or when in the proceeding for a review of its decision, evidence of a material character is presented to the Court. In the present case the Court has before it additional evidence not before the Board of General Appraisers, and the record is

much more full and complete than that before the Circuit Court of the Southern District of New York, and the Circuit Court of Appeals for the Second Circuit, in the case of U. S. vs. Nishimiya, above referred to. We must therefore determine the question of similitude, here presented, without aid from the ordinary presumption which would otherwise attach to the finding of the Board of General Appraisers, and the very great weight to which the decision of the courts, just mentioned, in the case of U. S. vs. Nishimiya, would be entitled—if the record now before us was the same as that submitted to those courts in that case.

Section 7 of the Dingley Tariff Act provides that when a non-enumerated article "is similar either in material, quality, texture, or the use to which it may be applied to any article enumerated in the act, it shall pay the same rate of duty which is levied on the enumerated article which it most resembles in any of the particulars before mentioned.

249 One of the definitions of the word "similar," which is given in Webster's Dictionary, is:

"Nearly corresponding; resembling in many respects; somewhat like; having a general likeness."

We think it is in this sense the word is used in the section, just quoted. The language of the statute is that each imported article, not enumerated, which is similar "either in material, quality, texture, or the use to which it may be applied, shall pay the same rate of duty which is levied on the enumerated article which it most resembles, in any of the particulars, before mentioned"; thus showing clearly that the article need not be the same in all respects, but that the required similarity is shown if there is a resemblance, either in material, quality, texture, or the use to which it may be applied. And this similarity must, of course, be a real, or substantial similitude, in some one of the essential particulars named.

Murphy vs. Arnson, 96 U. S. 131.
Arthur vs. Fox, 108 U. S. 125.
Waddell vs. United States, 124 Fed. 301.

As neither wine nor sake has texture, the only possible resemblance between them must be in material, quality, or use.

It is claimed, upon the part of the importer, that there is no similarity in the material from which sake and still wine are
250 made, as wine is a fermented product of the juice of grapes, or other fruits, while sake is a product of the fermentation of rice—and made by a process similar to that employed in the manufacture of beer. This difference, however, in the original materials, from which sake and wine are made, is not, in our opinion, controlling, as the law, in fixing the rate of duty, concerns itself with the condition of the article at the time of importation.

United States vs. Schoonling, 146 U. S. 76.
United States vs. Woton, 53 Fed. 344.

The evidence discloses that there is some difference in the chemical composition of sake and still wine. This difference consists in the presence in one of a small percentage of certain substances not found

in the other. The flavor of sake is somewhat different from that of wine, although in both there is an alcoholic taste. The evidence also shows that wine improves with age, while sake deteriorates. The best quality of sake will not keep for a longer period than one year. Wine may be diluted with water, without spoiling it, but water added to sake will cause it to become flat, within a day or two, and spoiled as a beverage. These are some of the differences, in general characteristics, which distinguish still wine from sake. But, on the other hand, in alcoholic strength, there is great similarity between sake and still wines, and alcohol is the principal ingredient in both sake and wine. In the particular importation involved in
251 this case, the percentage of alcohol is 18 per cent, and the evidence shows that in still wines the percentage of alcohol ranges between eleven and sixteen per cent. It thus appears that in alcoholic strength there is great similitude between sake and some still wines, and that in comparing one with the other the difference between them arises from the difference between the other ingredients, which constitute only a small percentage of their composition. The predominant substance in both is alcohol, and in our opinion, notwithstanding the difference in minor ingredients, there is by reason of the similarity in alcoholic strength a substantial similarity in the material which enters into the composition of the two articles.

We think there is also a similitude in use between sake and still wine, both being drank for purposes of exhilaration, and both are capable of producing intoxication; although intoxication from the use of sake passes off more quickly, than that produced by wine.

The conclusion that there is a similarity between sake and still wine in the material of which they are compounded is somewhat strengthened by the facts, before referred to, that in 1894 a claim was made by an importer of sake that it should be classed for duty as a still wine, by similitude; the decision of the General Board of Appraisers upholding that contention, and the long acquiescence upon the part of importers in this classification. These facts
252 tend strongly to show that in the opinion of merchants interested in the question the classification thus fixed was correct; and in a case like that before us, in which there is a conflict in the evidence, the facts referred to are entitled to great weight.

Judgment reversed.

[Endorsed:] No. 1361. United States Circuit Court of Appeals for the Ninth Circuit. Opinion. Filed May 18, 1908. F. D. Monckton, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 1361.

THE UNITED STATES OF AMERICA, Appellant,
vs.
KOMADA & CO., Appellee.

Decree United States Circuit Court of Appeals.

Appeal from the Circuit Court of the United States for the Northern District of California.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Northern District of California, and was duly submitted.

On consideration whereof, it is now here ordered, adjudged
253 and decreed by this Court, that the decree of the said Circuit Court in this cause be, and the same is hereby, reversed.

[Endorsed:] Decree. Filed and entered May 18, 1908. F. D. Monckton, Clerk.

At a stated term, to wit, the October term A. D. 1907 of the United States Circuit Court of Appeals for the Ninth Circuit, held at the courtroom, in the City and County of San Francisco, on Wednesday, the tenth day of June, in the year of our Lord one thousand nine hundred and eight.

Present: The Honorable William B. Gilbert, Circuit Judge; Honorable Erskine M. Ross, Circuit Judge; Honorable William W. Morrow, Circuit Judge.

No. 1361.

THE UNITED STATES OF AMERICA, Appellant,
vs.
KOMADA & CO., Appellee.

Order Staying Issuance of Mandate.

Upon motion of Mr. Henry C. Dibble, counsel for the appellee, ordered, issuance of mandate of this Court to the Court below in the above-entitled cause stayed to and including October 5, 1908.

254 United States Circuit Court of Appeals for the Ninth Circuit.

No. 1361.

THE UNITED STATES OF AMERICA, Appellant,
vs.
KOMADA & CO., Appellee.

Certificate of Clerk United States Circuit Court of Appeals to Proceedings and Record.

I, Frank D. Monckton, Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing fourteen (14) pages, numbered from one (1) to fourteen (14), to be a true copy of all proceedings had in the above-entitled case in the said the United States Circuit Court of Appeals for the Ninth Circuit, as the same remain on file and of record in my office, and that the same in connection with the preceding certified copy of the printed Condensed Transcript of Record in the above-entitled case constitute a true copy of the entire record therein, excluding the original exhibits.

Attest my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 20th day of June, A. D. 1908.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON, *Clerk.*

255 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Ninth Circuit, Greeting:

Being informed that there is now pending before you a suit in which The United States of America is appellant and Komada & Company is appellee, which suit was removed into the said Circuit Court of Appeals by virtue of an appeal from the Circuit Court of the United States for the Northern District of California, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Cir-

256 cuit Court of Appeals and removed into the Supreme Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justices of the United States, the second day of December, in the year of our Lord one thousand nine hundred eight.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

257 [Endorsed:] File No. 21,284. Supreme Court of the United States. No. 488, October Term, 1908. Komada & Co. vs. The United States. Docketed. No. 1361. United States Circuit Court of Appeals for the Ninth Circuit. Writ of Certiorari. Filed Mar. 17, 1909. F. D. Monckton, Clerk U. S. Circuit Court of Appeals for the Ninth Circuit.

258 In the Supreme Court of the United States, October Term, 1908.

No. 488.

KOMADA & COMPANY, Petitioner,
vs.
THE UNITED STATES, Respondent.

Stipulation as to Return to Writ of Certiorari.

It is hereby stipulated by counsel—

1. That on the hearing of the cause in the Supreme Court counsel for the Government may submit for inspection and examination by the Court for the same purposes and with the same effect as if the identical liquids had been introduced in evidence below, one or more bottles of "Jimenez & Lamothe" Amontillado Sherry wine and of "Duff-Gordon Sherry" wine which he shall state, in his opinion, are substantially identical in quality and character with the samples of such wines referred to in the testimony of Alexander D. Shaw, witness for the Government, and introduced in evidence below as Exhibits 3 and 4. Such counsel may also, in like manner and with like effect, submit samples of fresh sake as provided for in Paragraph 6 of the stipulation in the record relating to Exhibits (Record below, pp. 17, 18).

2. That the certified copy of the record now on file in this Court—including the samples of liquids and other Exhibits heretofore transmitted and now in the hands of the Marshal—shall constitute the return of the Clerk of the Circuit Court of Appeals for the Ninth Circuit to the writ of certiorari issued herein.

March 9", 1909.

W. WICKHAM SMITH,
Counsel for Petitioner.
H. M. HOYT,
Solicitor General.

259 (Endorsed:) Docketed. No. 1361. United States Circuit Court of Appeals for the Ninth Circuit. The United States of America, Appellant, vs. Komada & Co., Appellee. Stipulation of Counsel Relative to Return to Writ of Certiorari, Etc. Filed March 16, 1909. F. D. Monckton, Clerk.

260 United States Circuit Court of Appeals for the Ninth Circuit.

No. 1361.

THE UNITED STATES OF AMERICA, Appellant,
vs.
KOMADA & CO., Appellee.

Certificate of Clerk of the United States Circuit Court of Appeals to Stipulation of Counsel Relative to Return to Writ of Certiorari.

I, Frank D. Monckton, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the next preceding two (2) pages, numbered one (1) and two (2), respectively, to be a true copy of a "Stipulation of Counsel Relative to Return to Writ if Certiorari, Etc.," filed in the above-entitled cause on the 16th day of March, A. D. 1909, as the original thereof remains on file and of record in my office.

Attest my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 18th day of March, A. D. 1909.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON, *Clerk*.

261 United States Circuit Court of Appeals for the Ninth Circuit.

No. 1361.

THE UNITED STATES OF AMERICA, Appellant,
vs.
KOMADA & CO., Appellee.

Return to Writ of Certiorari.

By direction of the Honorable the Judges of the United States Circuit Court of Appeals for the Ninth Circuit, I, Frank D. Monckton, as Clerk of the said Court, in obedience to the annexed Writ of Certiorari issued out of the Honorable the Supreme Court of the United States and addressed to the Honorable The Judges of the United States Circuit Court of Appeals for the Ninth Circuit, commanding them to send, without delay, to the said Supreme Court the record and proceedings in the above-entitled cause, do attach to the said Writ a certified copy of a stipulation entered into by and between the counsel for the respective parties to the said cause, the original of which stipulation is on file and of record in my office, and do hereby certify the said stipulation as due return to the said writ.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said the United States Circuit Court of Appeals for

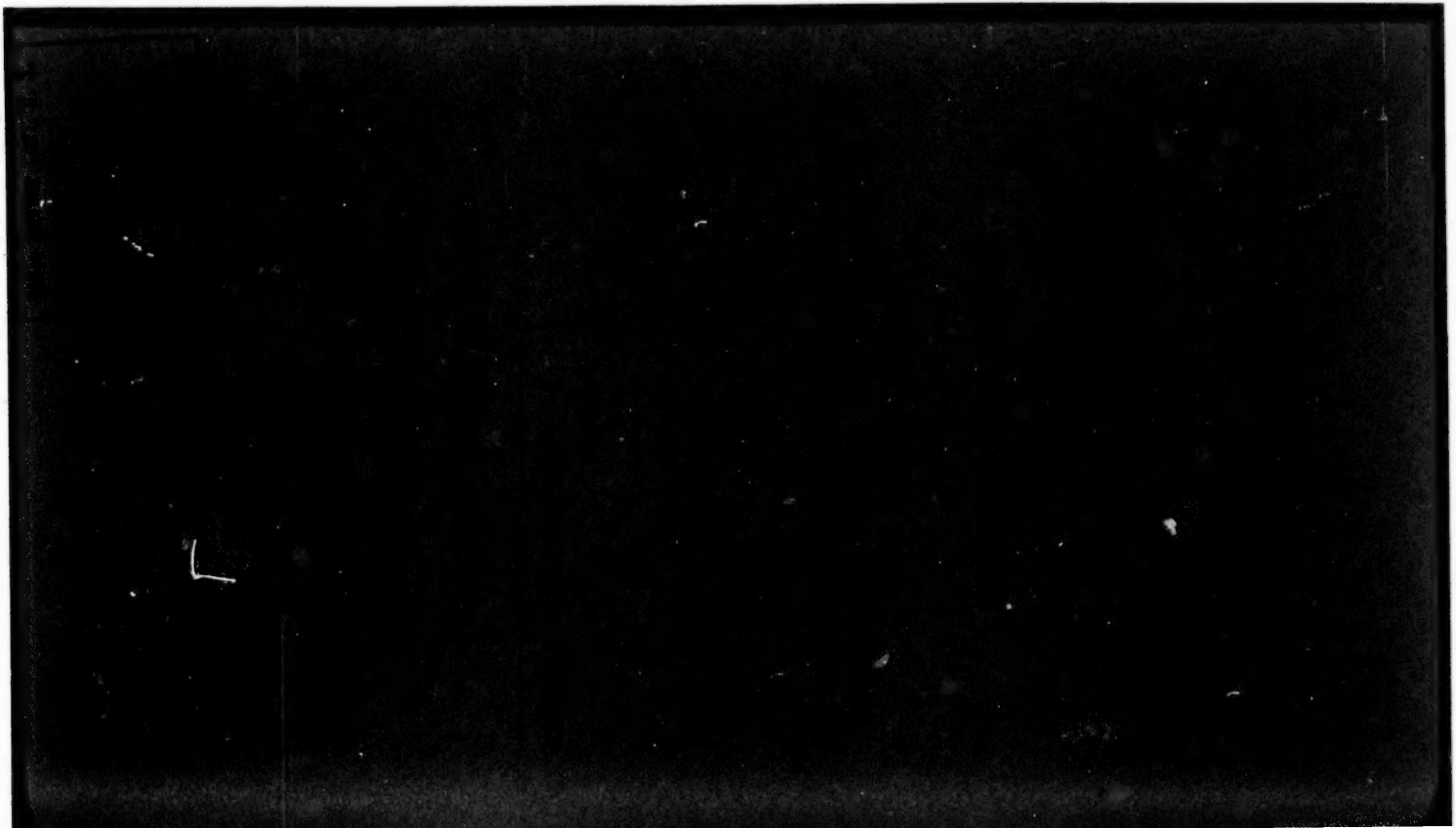
the Ninth Circuit, at the City of San Francisco, in the State of California, this 18th day of March, A. D. 1909.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON, *Clerk.*

[Endorsed:] 488/21284.

262 [Endorsed:] File No. 21,284. Supreme Court U. S. October Term, 1909. Term No. 220. Komada & Co., Petitioner, vs. The United States. Writ of certiorari and return. Filed March 26, 1909.



No. 220.

In the Supreme Court of the United States.

OCTOBER TERM, 1909.

KOMADA AND COMPANY, *Petitioner*, vs. THE UNITED STATES OF AMERICA, *Respondent*.	No. 220.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS OF THE NINTH CIRCUIT.

BRIEF OF THOMAS FITCH OF COUNSEL FOR PETITIONER.

Statement of the Case.

This action is pending here on writ of certiorari to the United States Court of Appeals of the Ninth Circuit, which reversed the judgment of the United States Circuit Court for the Northern District of California in favor of Komada and Company, the petitioner herein.

This action presents a controversy between Komada and Company and the United States of

America as to whether the Japanese beverage known as "sake," which is fermented from rice and water by a process similar to brewing, and which contains no added alcohol, was properly classified under the Tariff Act of 1897 as a still wine by similitude dutiable at fifty cents per gallon, or whether it should have been classified either as a beer by similitude dutiable at twenty cents per gallon, or as a non-enumerated manufactured article, dutiable at twenty per cent. *ad valorem*.

HISTORY OF SAKE DECISIONS.

Prior to 1894 sake was classified as a distilled liquor. In that year a Japanese importer named Woczens protested against this classification, and claimed that sake should be classed as a still wine by similitude. He did not claim, as was claimed by the plaintiffs in error here, that sake is either a beer by similitude or a non-enumerated manufactured article, and the only question then passed upon by the Board of United States General Appraisers was whether sake was or was not a distilled liquor. The Board decided that question as follows:

> "Sake is not spirits manufactured or distilled from grain or other materials, and is not distilled or compounded with distilled spirits."
>
> T. D. 15392, G. A. 2786.

The government acquiesced in this decision and the classification of sake was changed from that of a distilled liquor to that of a still wine by similitude.

In 1902 sake importers began filing protests against the classification of sake as a still wine and

claimed that it is either a beer by similitude, or a non-enumerated manufactured article.

One of these protests made by Nishimiya and Company of New York, was decided by the Board of United States General Appraisers against the importers who appealed to the United States Circuit Court for the Southern District of New York. That court ruled as follows:

> "This beverage is neither ale, beer, nor still wine. It is similar to beer in that the material from which it is made is rice, and in the fact, that it is like beer or ale fermented with yeast. It is more like wine than beer in its quality as the percentage of alcohol in it is about 17 per cent., while the percentage of alcohol in beer ranges between 3½ and 9 per cent., and in wine between 7½ and 16 per cent. A test of the sample by taste and smell and examination indicated that it is only remotely similar in quality to either wine or beer. In use it is like either liquid, being drank for flavor and exhilaration; unlike them in that it is ordinarily drank hot. * * * Sake is not sufficiently similar to still wine to warrant its assessment for duty under paragraph 296 of the Act."
>
> U. S. vs. Nishimiya, 131 Fed. Rep. 650, at 651 (Rec. p. 15).

The Government appealed from this decision to the United States Circuit Court of Appeals for the Second Circuit, which affirmed the decision of the lower court, as follows:

> "In many particulars sake is wholly unlike anything mentioned in schedule H of the Tariff Act.

"The similarity to still wines based upon the large amount of alcohol found in the imported merchandise, presents the strongest reason in justification of the collector's classification. In other respects we incline to the opinion that the importer presents the stronger argument.

"Taking everything into consideration there are certainly as many points of resemblance between sake and beer as between sake and still wines. If there were no alternative, but to select one or the other of these similitudes, it is probable that the decision would be in favor of the appellee, under the rule that resolves a doubtful question of Tariff interpretation in favor of the importer. But sake has so many characteristics which are not found in either wine or beer, its ingredients are so unusual and the process of its manufacture so unique, that it may fairly be held it is nowhere described, except by the general language of Section 6.

"The decision of the Circuit Court is affirmed."

U. S. vs. Nishimiya 137 Fed Rep. 396, 398.
Suit 3451, T. D. 2615.
(Rec. p. 18.)

ORDER OF ACQUIESCENCE.

Upon receipt of the foregoing decision the Secretary of the Treasury, on March 18th, 1905, issued an order to the Collector of Customs in New York, acquiescing in the decision of the United States Circuit Court of Appeals for the Second Circuit, and ordering the refunds claimed to be paid.

T. D. 26167, 14586½

Ten days later the Secretary withdrew his order of acquiescence, on the grounds that "sake was an alcoholic beverage; that the decision of the courts would necessitate refunds by the Government to the extent of $500,000; and that acquiesence was withdrawn with a view to the filing of an application for a writ of *certiorari*, in order that the issue might be reviewed by the United States Supreme Court."

No application for a writ of *certiorari* was made to the Supreme Court. The Treasury Deartment paid the refunds to Nishimiya & Co. and the Secretary ordered a new test case on an importation of sake made into the port of San Francisco by Komada and Company, the plaintiffs in error here.

The United States Board of General Appraisers, after hearing the evidence of ten witnesses for the Government, and four witnesses for the importers decided for the importers on the ground that "they should not feel warranted in holding that the present case is sufficiently differentiated from the Nishimiya case to authorize a departure from the rulings of the courts."

Decision U. S. Appraisers Protest 147, 545, 7069.

The Government appealed from this decision of the appraisers to the United States Circuit Court for the Northern District of California. Evidence was then taken by stipulation in New York, in Cincinnati, in Milwaukee, in St. Louis and in Honolulu of sixteen witnesses for the Government and nineteen witnesses for the importer, and by stipulation all the evidence in the Nishimiya case was considered as in evidence in this case.

Upon this evidence the United States Circuit Court for the Northern District of California decided as follows:

> "Sake is manufactured from rice by a peculiar process of fermentation, and in this respect resembles beer in being made from a cereal. * * * The process of fermentation does not resemble that of wine. * * * The process is different and the product is a different material. Sake resembles wine in color, as it does beer, but differs in every other respect."
>
> U. S. Circuit Court, Northern District of California, in U. S. v. Komada.
> (Rec. p. 128.)

The Government appealed from this decision to the United States Circuit Court of Appeals for the Ninth Circuit, which reversed the decisions of all the other courts, as follows:

> "The court has before it additional evidence not before the Board of General Appraisers, and the record is much more full and complete than that before the Circuit Court of the Southern District of New York and the Circuit Court of Appeals for the Second Circuit in the case of U. S. vs. Nishimiya. We must therefore determine the question of similitude here presented, without aid from the ordinary presumption which would otherwise attach to the finding of the Board of General Appraisers, and the very great weight to which the decision of the courts just mentioned in the case of U. S. vs. Nishimiya would be entitled—if the record now before us was the same as that submitted to those courts in that case. * * *

"The difference in the original materials from which sake and wine are made is not in our opinion controlling, as the law, in fixing the rate of duty concerns itself with the condition of the article at the time of importation. * * *

"It appears that in alcoholic strength there is great similitude between sake and some still wines, and that in comparing one with the other the difference between them arises from the difference between the other ingredients which constitute only a small percentage of their composition. The predominant substance in both is alcohol, and in our opinion, notwithstanding the difference in minor ingredients there is by reason of the similarity in alcoholic strength a substantial similarity in the material which enters into the composition of the two articles. * * *

"We think there is also a similitude between sake and still wine both being drank for purposes of exhilaration.

"The conclusion that there is a similarity between sake and still wine in the material of which they are composed is somewhat strengthened by the fact that in 1894 a claim was made by an importer of sake that it should be classed for duty as a still wine by similitude, the decision of the General Board of Appraisers upholding that contention and the long acquiescence upon the part of importers in this classification. These facts tend strongly to show that in the opinion of merchants interested in the question, the classification thus fixed was correct; and in a case like that before us in which there is a conflict in the evidence the facts referred to are entitled to great weight."

(Rec. pp. 133, 134, 135.)

ASSIGNMENT OF ERROR.

The plaintiff in error respectfully submits that in the record, proceedings, decision and final judgment of the United States Circuit Court of Appeals for the Ninth Circuit in the above entitled matter, there is manifest error in this, to-wit:

1. For that the court erred in not finding and deciding that sake is under the Tariff Act of 1897, a non-enumerated manufactured article subject to a duty of twenty per cent, *ad valorem*.

2. For that the court erred in finding and deciding that sake is under the Tariff Act of 1897, a still wine by similitude.

3. For that the court erred in reversing the judgment of the United States Circuit Court for the Northern District of California, and of the United States Board of General Appraisers in this case.

4. For that the court erred in finding that there was any additional evidence whatever before it that was not before the United States Board of Appraisers as to the point of alcoholic strength of sake on which point alone the court decided this case.

5. For that the court erred in finding that the additional evidence before it was not before the United States Board of Appraisers on all the points of this case and was not merely cumulative and was not in favor of the importer.

6. For that the court erred in finding that the predominant substance in sake is alcohol.

7. For that the court erred in finding that the original materials from which sake and wine are

made is not controlling, that only the condition of the article at the time of importation without regard to the material from which it is made should be considered.

8. For that the court erred in finding that the fact that sake and wine are both beverages which are drank for purposes of exhilaration constituted a similitude in use under the customs law.

9. For that the court erred in finding that there was a long acquiesence by importers in the classification of sake as a still wine.

10. For that the court erred in finding that there is a conflict in the evidence in this case.

Argument.

FINDINGS OF FACT NOT REVERSIBLE.

The rule is that findings of fact by the Board of Appraisers, which on additional evidence were sustained by the United States Circuit Court will not be reversed by the appellate courts.

> "Similitude is a fact, and when found by the Board upon warrantable evidence on a proper issue, the finding should stand."
>
> U. S. vs. Hahn, 91 Fed. Rep. 755.

> "The Board came to their conclusion on the facts presented to them, and I cannot say it is so against the weight of evidence that the court should set it aside. If this case were an appeal from the decision of a referee, the court, although it might have reached a different conclusion, had the case been tried originally before it, would not, under familiar rules, disturb the report.
>
> "In a proper case, no doubt, this court may go back of the decision of the Board of Appraisers

and the Circuit Court, and review the case upon the evidence, and if need be, overrule their decision. But it requires a clear case to enable the court to do that. This court ought not, and will not, review a finding of fact made by the Board of General Appraisers, and not controverted by new evidence in the Circuit Court, except it be manifest that the decision of the Board of Appraisers is unsupported by the evidence, or is clearly against the weight of evidence."

> Apgar vs. U. S., 78 Fed. Rep., 332, 334 (C. C. A.).

"Decisions of the Board of General Appraisers on disputed evidence as to fact will not be disturbed by the court."

> Re White, 53 Fed. Rep. 787.
> Re Steiner, 66 Fed. Rep. 726.
> White vs. U. S., 72 Fed. Rep., 251.

"We conclude that the return (that is, the report by the Board of Appraisers) is to be considered substantially as the report of a Master in an equity cause would be considered by the Circuit Court, or as the record including the opinion of the court in an equity or admiralty cause in the district or circuit court would be considered by this court, upon an appeal from the decree. The circuit court should not undertake to disturb the findings of the Board upon doubtful questions of fact. . . ."

> Re Van Blankensteyn, 56 Fed. Rep., 474, 477.

It is only when a finding of fact by the Board of Appraisers is wholly without evidence to support it, or when it is clearly contrary to the weight of evidence that it should be disregarded.

Re Van Blankensteyn, supra.

"On a review of a decision of the Board of General Appraisers, a finding of fact by the Board should not be reversed where the evidence was such that if the finding had been made by a jury instead of the Board the verdict would not have been set aside as not warranted by the evidence."

Ralli vs. U. S., reported in Treasury decisions, No. 26821.

Further evidence, in order to warrant a reversal, should not be merely cumulative. The government evidence taken on the appeal in this case is strictly of a cumulative character. The importer was the only party who produced any further evidence concerning points not touched on by him heretofore. Furthermore additional evidence, even if new, is insufficient to warrant a reversal, if it be conflicting. The decision of the Circuit Court affirming the decision of the Board of Appraisers should be affirmed, unless an affirmance would in effect be to find clearly against the weight of evidence.

The United States Circuit Court of Appeals for the Ninth Circuit said in its decision now under review:

"In the present case the court has before it additional evidence not before the Board of General Appraisers, and the record is much more full and complete than that before the Circuit Court of the Southern District of New York and the Circuit Court of Appeals for the Second Circuit in the case of U. S. vs. Nishimiya. We must therefore determine the question of similitude here presented without aid from the ordinary presumption which would otherwise attach to the finding of the Board of General Appraisers,

and to the very great weight to which the decision of the courts, just mentioned, in the case of U. S. vs. Nishimiya would be entitled—if the record now before us was the same as that submitted to those courts in that case."

(Rec. p. 133).

I appeal to the record, which will show that with respect to the sole point on which the decision under review was made, viz., the alcoholic strength of sake, there was no additional evidence whatever, and none was needed, for it is a point that was never at any time contested by the importer.

With respect to the other points, viz., material from which made, process of manufacture, chemical composition of the finished article, color, odor, taste, stability and manner of use, the additional evidence was overwhelmingly in favor of the importer.

I will consider these in their order:

POINTS OF SIMILITUDE.

The points of similitude prescribed by the Customs Act of 1897 are material, quality, texture, and use to which applied.

"Quality" under the Tariff Act means "degree of excellence" and is not applicable in this case.

"Texture" is clearly inapplicable to a liquid.

"Use to which applied" is also inapplicable to a liquid, which, equally with beer, wine, whiskey or any alcoholic or spirituous beverage is drank for flavor and exhilaration, and if the manner of use is considered it appears that sake is usually heated before being drank, which is not the case with wine.

SIMILITUDE MUST BE SUBSTANTIAL.

The courts have said:

"The similitude of one article to another under the import duty Act, must be substantial."

Arthur vs. Fox, 108 U. S. 125.

"Must be a substantial similitude. It is not enough that it bears more resemblance to one enumerated article than another, because it might have no substantial similitude to either."

Murphy vs. Aronson, 96 U. S. 131.

In determining whether there is a similitude in material there should be considered both the original material from which an article is made, the process of its manufacture and the finished material into which it is made and if on consideration and comparison of all the evidence there is a doubt, the importer will be accorded the benefit of the doubt.

DOUBTFUL CLASSIFICATION.

"In cases of doubtful classification of articles the construction is to be in favor of the importer."

Powers vs. Barney, 5 Blatchf. 202;
Adams vs. Bancroft, 5 Sumner 384;
Hartranft vs. Wiegmann, 121 U. S. 609;
Am. N. & T. Co. vs. Worthington, 141 U. S. 468;
U. S. vs. Wiggleworth, 2 Story 369;
U. S. vs. Davis, 54 Fed. Rep. 147;
Matheson and Co. vs. U. S., 71 Fed. Rep. 394;
Hempstead & Sons vs. Thomas, 122 Fed. Rep. 538.

Section 7 of the Tariff Act does not change the rule prescribed by the courts. The Act of Congress provides that only where the similitude of two or more enumerated articles is *equal*, then the highest rate of duty shall be imposed.

But in order to put this provision of Section 7 in operation the similitude must be *equal*. If there is a doubt as to the equality that doubt must be resolved in favor of the importer. The United States Circuit Court of Appeals for the Second Circuit, did not—in its decision in the Nishimiya case—overlook Section 7, for, with respect to an equal similitude of sake to wine or beer, it says:

> "We incline to the opinion that the importer presents the stronger argument. If there were no alternative but to select one or the other of these similitudes, it is probable that the decision would be in favor of the importer under the rule that resolves a doubtful question of tariff importation in favor of the importer.
>
> U. S. vs. Nishimiya, 137 Fed. Rep. 396.

DOUBTS RESOLVED IN FAVOR OF IMPORTER.

The court made clear the distinction, that while the highest rate of duty will be imposed where the similitude is equal, yet, in determining whether there is or is not an equality, the doubt will be resolved in favor of the importer.

> Tiffany vs. U. S. 112 Fed. Rep. 672;
> Guggenheim Smelting Co., 112 Fed. Rep. 517;
> U. S. vs. Dana, 99 Fed. Rep. 433;
> In re Herter Bros., 53 Fed. Rep. 913;
> Mandell et al. vs. Seeberger, 39 Fed. Rep. 760.

SIMILITUDE IN ORIGINAL MATERIAL.

There was no additional evidence offered to dispute the evidence given in the Nishimiya case and conceded by the Government both in that case and in this case with respect to the original material from which sake is made—rice—and the original material from which wine is made—a fruit juice.

The original material from which an article is made is a controlling factor in determining its classification for customs purposes. There can be no quality that is not a quality of a material, no texture that is not a texture of a material, no use to which applied that is not a use of a material.

Sake is made from a cereal—rice—and water. Wine is made from a saccharine fruit juice—usually grapes. The difference in original material between wine and sake is fundamental and irreconcilable and must, notwithstanding a resemblance in alcoholic strength, make it impossible for sake, which is brewed from a grain, to bear a substantial similitude to wine, which is fermented from a fruit juice.

The United States Circuit Court of Appeals for the Ninth Circuit, in its decision now under review, attempts to put aside or ignores this difference in original material between sake and wine. It says:

> "This difference in the original materials, from which sake and wine are made, is not, in our opinion, controlling, as the law, in fixing the rate of duty, concerns itself with the article at the time of importation."
>
> (Rec., p. 134).

And the court cites as sustaining its views:

> U. S. vs. Wooton, 53 Fed. Rep. 344;
> U. S. vs. Schoverling, 146 U. S. 76.

The authorities cited do not in the least sustain the position of the court in the decision under review.

In U. S. vs. Wooton, 53 Fed. Rep. 344, the court held that the similitude section, relating only to non-enumerated articles was inapplicable.

The importation was of plucked coney skins. All that had been done to them after being taken off the animal was to open them, cut off the legs, ears and other useless parts, clean and stretch them and pluck the long hair from them. They were then in condition to be dressed for use in making various garments, or to have the fur cut off and manufactured into hats. The Tariff Act at that time provided that furs dressed on the skin, but not made up into articles, and furs not on the skin prepared for hatters' use, should pay a duty of twenty per cent. *ad valorem*, while furs undressed and fur skins of all kinds not dressed in any manner were in the free list.

It was contended by the importer that these coney skins, being undressed, were on the free list.

It was contended by the government that being partially dressed by plucking, the skins could now be dressed so as to be used for making and trimming various garments, or for making hats and should therefore be subject to a duty of twenty per cent. *ad valorem*.

The court held that the actual character and condition of the skins when imported and not the use to which they are subsequently to be put determined their classification, and that these coney skins not being dutiable as dressed furs or skins, should be admitted free of duty.

In the other case cited by the court below—that of United States vs. Schoverling, 146 U. S. 76—

the question was whether gun stocks imported as such should be assessed as completed guns, dutiable at three dollars and seventy-five cents each, or as nonenumerated manufactured articles dutiable at twenty per cent. *ad valorem* or sixty cents. It appeared that gun barrels imported separately by another importer, were also assessed as nonenumerated manufactured articles dutiable at twenty per cent. *ad valorem* or sixty cents. Thus by collusion between two importers, one importing the stocks and the other importing the barrels, the guns could be brought into this country at a duty of one dollar and twenty cents each, instead of three dollars and seventy-five cents each, as completed guns.

The court held that the fact that the gun stocks and the gun barrels thus separately imported could be and doubtless would be joined by the two importers to the detriment of the revenue, furnished no reason for the assessment of the gun stocks as other than nonenumerated manufactured articles for "the dutiable classification of articles must be determined by an examination of them in the condition in which they were imported."

I cannot see that either of these cases has any application whatever to this controversy.

The condition of sake at the time of its importation is that of a beverage fermented from a grain and water. This fact is conceded without dispute.

A recent decision of the United States Circuit Court of Appeals for the Second Circuit, which was evidently not considered, or at least not referred to by the United States Circuit Court of Appeals for the Ninth Circuit, is as follows:

> "Imitation silk yarn made from cotton waste resembled equally silk yarn and cotton yarn in

> the particulars of texture, quality and use, but *as the material from which it was made* was cotton, it must be classified as a cotton yarn."
>
> Von Bernuth vs. U. S., 146 Fed Rep 61

And to the same effect, see:

> Arthur vs. Fox, 108 U. S. 125;
> Hahn vs. U. S., 100 Fed. Rep. 635.
> U. S. vs. Dana, 99 Fed. Rep. 433.
> Tiffany vs. U. S. 112 Fed. Rep. 672.
> In re Herter Bros., 53 Fed. Rep. 913.
> Mandel vs. Seeberger, 39 Fed. Rep. 760.

"There should be considered the *original material* from which an article is made."

> (See authorities cited under head of "Similitude Must Be Substantial.")

PROCESS OF MANUFACTURE.

The additional evidence in this case as to process of manufacture of sake and of wine not only does not in any way change the evidence given in the Nishimiya Case, but it causes counsel for Government to admit that it is substantially correct. The Circuit Court of Appeals for the Ninth Circuit ignores this point altogether, and counsel for the Government in their brief dismiss "process of manufacture" as not one of the criteria named in Section 7 of the Tariff Act.

Conceding that process of manufacture is not one of the criteria directly named in Section 7 of the Tariff Act, yet in determining similitude it may be considered.

> "It is a fact for the jury to decide whether the imported article is or is not within the designation of the Tariff Act; it is not a question

of law for the court. Testimony was given as to the materials of which the goods are composed, *and their methods of manufacture.*"

Weilbacher vs. Merritt, 37 Fed. Rep. 85.

"All the testimony that had any bearing upon that question—the goods themselves, *the manner in which they were woven and dyed*, the result of the dying and every other fact and circumstance was to be taken into consideration, and allowed their proper effect in coming to a conclusion in regard to the similarity or dissimilarity of the two fabrics."

Greenleaf vs. Goodrich, 10 Fed. Cases, 1168 Affirmed, 101 U. S. 278.

The process of manufacture of wine is described by C. A. Wetmore, for the importer (Rec. p. 26), and by P. T. Morgan for the Government (Rec. pp. 62 and 63). They do not differ in their description. The grapes are gathered, deposited in a vat and crushed. The sugar in solution in the grape juice is fermented by the natural yeast existing in the grape skins, and there is but one process of fermentation.

The process of manufacture of beer is described by J. A. Hieronimus for the Government (Rec. p. 67). Raw barley is soaked until it sprouts. The sprouting, or "malting," as it is called, creates a diastase which changes the starch of the grain into sugars, called maltose and dextrine. The sprouted grain is then dried, crushed, and mixed with water at a proper temperature, and an artificial yeast is added, which ferments the maltose and dextrine into alcohol. Hops are added to flavor the beer, which is thus produced.

The process of manufacture of sake is described for the Government by A. Schneider (Rec. p. 57.)

and by William Wenzel (Rec. p. 60). It is described for the importer by Adachi and Miyamoto (Rec. p. 18) and by Jokichi Takamine (Rec. p. 34). All the witnesses so agree that counsel for the Government says in his brief:

> "The description given by the Appellee's witness, Takamine, is believed to be sufficiently full and accurate."

In making sake the rice is husked and then steamed in order to gelatinize it. It is then cooled and an artificial yeast is added, consisting of spores or fungus made of rice, which converts the starch in the rice into maltose, and then, by one continuous fermentation, the maltose, is, with the same artificial yeast, converted into alcohol.

In the temperature to which it is subjected in the process of manufacturing, sake does not resemble wines. Professor Wyatt (for the Government) (Rec. p. 88), and Professor Wiley (for the Government) (Rec. p. 102), gave the temperature at which wines are fermented as "from 65 to 76 degrees," "and in California sometimes to 80 or 85 degrees. In Sherry only, if enough heat is not generated naturally, they heat it artificially to 90 or 100."

Adachi and Miyamoto (for the importer), who are sake makers, and whose testimony is accepted by the Government as correct, testify that the tubs containing steam cooked rice, yeast and water are kept heated, by throwing in kegs containing water heated to a temperature of 100 degrees and when sake is settled it is heated to a temperature of 135 to 140 degrees (Rec. p. 21).

While Government counsel conceded that the process of sake making was correctly described by Professor Takamine, they yet made a strenuous effort to show that it was not a beer process, and

to this end examined representatives of various breweries. None of these witnesses had any practical knowledge of how sake was made.

Manifestly, the process of making sake is not *identical* with that of brewing beer, because, if it were, the resultant beverage would be beer instead of sake. It is on this fact, apparently, that the Government witnesses based their opinion that sake was not brewed. It will be observed, however, that upon cross-examination, many of them admitted that certain steps in the sake process indicated to them that it had been brewed. The last witness for the Government in St. Louis, the expert of Anheuser-Busch, when asked what word in the English language best described the process of making sake, said that the term "brewing" was most applicable. Other witnesses, when not under the favoring influence of a direct examination, but under cross-examination, said that the presence of maltose in a beverage would indicate to them that a malt had been used, and a malting process employed; also that malt and malting were characteristic of a brewing process. The record is much encumbered with this testimony of Government witnesses to show that sake is not brewed. To support the importer's claim, however, it is sufficient that the sake process is absolutely different in all essential features from the process of making wine. But although the sake process is analagous to that used in the manufacture of beer it was held by the United States Circuit Court of Appeals to be not sufficiently so to create a similitude to beer and it was therefor classed by that court as a "unique" process.

A CHANGE OF FRONT.

It may not be out of place to remark that after producing and elaborately examining eleven brew-

ers and fermentologists in New York, Cincinnati, Chicago, Milwaukee, St. Louis and San Francisco to prove that sake is *not* a beer by similitude, counsel for the Government in their third assignment of error to the United States Circuit Court of Appeals for the Ninth Circuit claimed that the court below *erred in not finding sake to be a beer by similitude.*

CHEMICAL COMPOSITION.

With respect to the chemical composition of sake the new evidence is not only cumulative and cumulative for the importer but the evidence for the Government affirms the evidence for the importer so that the Circuit Court of Appeals for the Ninth Circuit says:

> "The evidence discloses that there is some difference in the chemical composition of sake and still wine. This difference consists in the presence in one of a small percentage of certain substances not found in the other."
> (Rec. p. 134.)

With all respect to the learned court I submit that it could not have attentively read the record for this "*some* difference" was shown by qualitative and quantitative analyses of sake, of beer and of wine made by chemists for both the Government and the importer, to be a radical difference.

The witnesses for the importer and the witnesses for the Government do not disagree as to the chemical composition of sake.

Herman Enderman (for the importer) testified:

> "I am a chemist; have analyzed sake and wine. Sake contains maltose which is the first product of the change of starch under the action of die-

tetic ferments. Still wines never contain maltose because wines are produced from saccharine juice and do not contain any starch. Malic and tartaric acid, which are always ingredients of wines produced from saccharine fruit juice were completely absent from sake." (Rec. p. 23.)

Jokichi Takamini (for the importer):

"Was Government chemist in the Department of Agriculture and Commerce in Japan. In the sample of sake I have analyzed there was maltose 1.90, dextrine 0.72. I looked for dextrose in sake but found none. I looked for maltose and dextrine in wine and found none. I looked for tartaric acid in sake and found none. Tartaric acid in wine was 0.45." (Rec. p. 35.)

Charles A. Wetmore (for the importer):

"Am chemist. Sake contains unfermented dextrines, wine contains malic and tartaric acids. There is no tartaric or malic acid in beer. There is no maltose in wine. There is maltose in beer." (Rec. pp. 26 and 28.)

Arthur Wilhelmj (for the importer):

"Am chemist. Sake contains unfermented dextrines and maltose while wine does not contain them. The chemical composition of beer is entirely different from wine." (Rec. p. 31.)

Louis Falkeneau (for the importer):

"Am chemist. Sake is different chemically from wine in that it contains substances which wine never contains. It contains dextrines and possibly some maltose." (Rec. p. 32.)

Frances Wyatt (for the Government):

"Am chemist. Analyzed sake. Contains 1.929 maltose, total acidity estimated as lactic acid

0.39. A true analysis of wine shows tartaric acid 0.3, dextrose 0.3. Of American ales lactic acid 0.18, maltose 1.70." (Rec. p. 84.)

W. D. Bigelow (witness for Government):

"Am chemist. Analyzed beer and wine. The sugar found in grapes is inverted sugar. It is a different type of sugar altogether from maltose." (Rec. pp. 92 and 96.)

It stands demonstrated by five chemists who testified for the importer and by two chemists who testified for the Government and it was not disputed by anybody, that sake contains maltose and dextrine and does not contain malic acid, tartaric acid, or dextrose and that wine contains malic acid, tartaric acid and dextrose, and does not contain maltose or dextrine.

STABILITY.

In the Nishimiya case there was no evidence offered with respect to the stability of sake. At the hearing of this case nine importers of sake and wine in Honolulu testified for the importer that wine improves with age, and that sake deteriorates; that tub sake spoils and becomes worthless in from three to six months, and bottled sake spoils in from nine to twelve months. A. Wirtz (Rec. p. 43), D. H. Lewis (Rec. p. 45), W. Lishman (Rec. p. 47), M. A. Gonsalves (Rec. p. 48), T. Sumida (Rec. p. 53), T. Iwanada (Rec. p. 54), S. Komija (Rec. p. 54), K. Odo (Rec. p. 55).

The Government offered no testimony to the contrary. The Circuit Court of Appeals for the Ninth Circuit notices this fact, for it says in its opinion:

"The evidence also shows that wine improves with age, while sake deteriorates. The best quality of sake will not keep for a longer period than one year. Wine may be diluted with water without spoiling it, but water added to sake will cause it to become flat within a day or two and spoiled as a beverage." (Rec. p. 135.)

Surely such new light as the new evidence on this new point, uncontradicted by the Government, cast upon the case was favorable to the importer.

USE TO WHICH APPLIED.

There was no contest either in the Nishimiya case or in the case under review as to the use to which sake is applied or the manner of use. Equally with wine, cider, beer, brandy, or cordials it is drank for flavor and exhilaration and unlike either of these beverages it is usually heated before being drank.

NON-EFFERVESCENCE.

It is conceded by the importers that sake and still wines are non-effervescent, and that commercial beers usually, but not invariably contain carbonic acid gas. Albert Schneider (for the Government) says: "There are still beers not usually considered fit to drink." (Rec. p. 59.) John B. Oppal (for the Government) says: "English stock ale and beer are still." (Rec. p. 69.) And most of the brewers testify for the Government that commercial beers are always effervescent. But Charles A. Wetmore (for the importers) testifies that "the ales are generally absolutely still." (Rec. p. 29) and Herman Enderman (for the importers) testifies that "beers vary through a very wide

margin in respect to degree of effervescence." (Rec. p. 24.)

Effervescence may be a quality of a material, but non-effervescence is not one. Similitude is created by the presence of the same quality in two substances, and not by its absence from both. The absence of carbonic acid gas from sake may decrease its similitude to commercial beer, but it does not increase its similitude to still wine.

COLOR.

Color is not a quality of a material by which a similitude can be established, and if it were then, by the testimony of witnesses for both parties, as well as by the exhibits before the court, it appears that sake resembles pale sherry, pale ale, Budweiser beer and any light amber hued liquid in color. It is a matter of common knowledge that wine is sometimes light colored, as in Rhine wines and pale Sherries, sometimes of a tawny color, as in brown sherries, and sometimes red, as in claret and burgundy. It is also matter of common knowledge that beers are always amber colored—light or dark, and that there is no red beer. How can it be claimed that sake, which resembles all beers and only some wines in color, bears a greater similitude in color to wine than it does to beer?

ALCOHOLIC STRENGTH.

It was never denied by the importer either in the Nishimiya case or in this case that in alcoholic strength sake ranges from 14 to 18 per cent., that still wines range from 7 to 20 per cent. and that beer and ales range from 3½ to 11 per cent.

TASTE.

Practically the only contested point as to sake was and is with respect to its similitude to wine in taste. In the Nishimiya case the Government adduced the testimony of Custom House Examiner F. P. Ball, who reported that "sake presents the physical characteristics (which included taste and odor) of sherry wine."

The importers in the Nishimiya case *did not offer any testimony with respect to taste*, but both the Appraisers and the courts evidently examined the samples of sake in evidence for the Appraisers found that sake resembled wine *somewhat* in taste (Rec. p. 15), and the United States Circuit Court in New York decided sake to be "*only remotely similar* to wine or beer in taste." (Rec. p. 15.)

The courts in the Nishimiya case considered the question of similarity in taste, allowed for it, and found against the Government.

In the present case the main effort of the Government was to establish a taste similitude, and most of the "additional evidence" was directed to this end, for as to all other points there was substantially no dispute.

EVIDENCE ON TASTE AND ODOR OVERWHELMINGLY AGAINST THE GOVERNMENT.

I submit that the additional evidence produced by the Government on taste is not only self-conflicting, but of the 26 witnesses for the Government on these points 23 either testified against its contention or so qualified their testimony as to render it valueless.

"Sake has a flavor *peculiar* to that particular drink."

A. Schneider (Rec. p. 59).

"Sake is *nearer* to wine than to beer in taste."

Wm. Wenzel (Rec. p. 61).

"Sake *might* resemble the taste of wine more than anything else."

H. F. Windler (Rec. p. 67).

"Sake tastes like steam beer."

John B. Oppal (Rec. p. 69).

"Sake resembles sherry material" (a non potable liquid).

C. S. Ashe (Rec. p. 61).
C. Schilling (Rec. p. 63).
A. Lachman (Rec. p. 65).

"Sherry material is the term used only by dealers, not by the trade generally, to designate a mixture of white wine and alcohol, which is afterwards by a process of slow baking given the sherry flavor. Manufacturing chemists buy sherry material and make medicinal preparations out of it. Generally speaking those who purchase it do so for manufacturing purposes."

P. C. Rossi (Rec. p. 64).

The last foregoing witnesses were San Francisco manufacturers and dealers in California wines, and it is noticeable that counsel for the Government introduced no witnesses in San Francisco to show a similitude in taste between sake and the white wine from which sherry material is made. Neither did they introduce any witnesses to show a similitude in taste between sake and the imitation sherry made from sherry material. It was only in the intermediate stage of manufacture that the resemblance in taste to sake ap-

peared. It follows that the sake taste in sherry material is simply the alcoholic taste, and it appears that in addition to the alcoholic taste sake has a peculiar flavor of its own, that makes it readily distinguishable from sherry material.

Upon this San Francisco evidence the Board of U. S. General Appraisers decided for the importer, finding that the evidence was "not sufficiently differentiated from the Nishimiya case to authorize a departure from the rulings of the courts in that case." (Rec. p. 5).

Counsel for the Government took an appeal to the U. S. Circuit Court of Appeals for the Ninth Circuit, and finding themselves in the dilemma of having exhausted all the evidence in their favor that could be obtained in the only jurisdiction in which the case could be tried under Section 15 of the Act of June 10th, 1890, they obtained from counsel for the importer a stipulation agreeing that additional testimony might be taken in any part of the United States or in the Territory of Hawaii.

Having failed to obtain any satisfactory testimony showing a similitude in taste between sake and any wine manufactured in the United States, it is presumable that Government counsel next ransacked the importing centers, especially the Port of New York, to find an imported wine having a substantial resemblance to sake. In this also it seemed that the Government failed, for it sent a Treasury Agent to Spain—W. H. Williams (Rec. p. 75)—to find a wine the taste of which resembled sake.

The "Jiminez and Lamothe" sherry thus obtained by the Government was admitted by the

Government to be a wine specially imported by the Treasury Department for the purposes of this case (Rec. pp. 10 and 11). The reason for its general non-importation is given in the evidence for the Government, which shows it to be a wine of such wretched quality that none of it, except the case sent by Mr. Williame has ever been brought to this country.

A. D. Shaw (Rec. p. 71).
Julius Wile (Rec. p. 72).
C. R. Osborn (Rec. p. 174).
E. C. La Montagne (Rec. pp. 76-77).

The Government fared no better in New York than in San Francisc in its endeavors to prove that sake resembles sherry wine in taste. It called to the witness stand seven of the heaviest wine importers in New York, and not one of them made a clean cut, unequivocal statement that sake resembled wine in taste.

A. D. Shaw (Rec. p. 128), said: "Sake is sweeter. If I should taste the two (sake and Jiminez and Lamothe) I would be able to tell which was sake."

Julius Wile (Transcript, pp. 129 to 131) "Would compare it most *nearly* to very poor wine of some kind. There is a *very remote* similarity (to Duff Gordon sherry). If sake was in one glass and wine in another, I could pick them out."

Geo. B. Saddler (Rec. p. 73): "There is a *very slight similarity* between Duff Gordon sherry and sake. Sake has peculiar features of its own."

Charles R. Osborn (Rec. p. 74): "In *some characteristics* sake resembles wine. *Some similarity* to Jiminez and Lamothe. *No similarity to the Duff Gordon sherry.* Might pass with some people as a wine. *I don't think that anybody who*

had never seen it would know what it was. I didn't. *I thought it was a poor wine that had gone rotten."*

Charles Bellows (Rec. pp. 75, 76.): "I thought at first it was a manzanillo sherry that had gone wrong by the shipment of sea water. *Sake has a peculiar stringent character.* Sake *would not pass in this country* for a sherry wine among anybody who knew what sherry wine was. It is my candid opinion that *anybody in the wine trade who bought sake for sherry wine ought to go out of the business."*

E. C. La Montagne (T., pp. 138 to 142), (Rec., pp. 76 and 77): "*Wouldn't call it wine. Different in* flavor from Jiminez and Lamothe. *No resemblance between Duff Gordon sherry and sake.* Could tell it from anything in the world because of some *distinctive flavor of its own."*

Henry E. Gourd (Rec., pp. 80 and 81): "Really cannot consider sake as a wine. *Never tasted anything like sake.* There is a marked difference between the two."

From the wine importers of New York counsel for Appellant journeyed among the fermentologists and brewers of Washington and the Middle West, with the following result:

Dr. H. W. Wiley (Chief of Government Bureau of Chemistry): "A beverage which is produced from saccharine juice of fruits would have a marked difference in character and *taste* from a beverage produced from a farinaceous grain." (Rec., p. 102.)

William Forn (brewmaster, Cincinnati): "Have never tasted anything like sake before. *Some* similarity to sherry." (Rec., p. 109.)

Robert Wahl (fermentologist, Chicago): "In tartness it somewhat resembles a very old ale. I

noticed *a peculiar and distinctive flavor which* sake has. A marked difference in flavor." (Rec., p. 114.)

Cornelius Sippel (brewmaster, Chicago): "Never tasted anything like sake. Has a peculiar aroma. A kind of oriental taste. *A peculiar distinctive nature of its own.*" (Rec., p. 116).

Fritz Bock (Supt. Pabst Brewing Co., Milwaukee): "I noticed a *peculiar flavor* or aroma in the sake. *Entirely strange to me.*" (Rec., p. 117).

Alfred Uihlein (Supt. Schlitz Brewing Co., Milwaukee): "Reminds me *somewhat* of sherry wine. Am not a wine expert." (Rec., p. 119.)

Alfred Schedler (Chemist Pabst Brewing Co., Milwaukee): "The *peculiar* flavor of sake is due to the presence of various organisms." (Rec., p. 120).

William Kreiger (Brewer Anheuser-Busch Co., St. Louis): "I notice a peculiar oriental flavor to sake. That flavor, that taste stays with me for a length of time. *It is different from anything that I have ever drank.*" (Rec., pp. 122 and 123).

H. August Huenicke (Chemist Anheuser-Busch Co., St. Louis): "I noticed a *peculiar* flavor to this sake characteristic of that and *nothing else I have ever tasted.* I have drunk wines and think that I have tasted most every thing that is of interest." (Rec., p. 126).

The importer on the question of taste and odor introduced the following testimony:

Charles A. Wetmore, wine maker (Rec. pp. 28-30); Louis Falkneau, expert wine taster (Rec. p. 32); Arthur Wilhelmj, expert wine taster (Rec. p. 31); P. Takamine, expert wine taster (Rec. pp. 36-37); F. H. Hertsche, hotel manager and expert wine taster (Rec. pp. 51-52; F. H. Humphreys, physician, chemist and expert wine taster and wine

buyer (Rec. p. 49); George O'Neill, sake and wine importer (Rec. p. 75); A. Wirtz, sake and wine importer (Rec. p. 42); D. H. Lewis, sake and wine importer (Rec. p. 45); W. Lishman, sake and wine importer (Rec. p. 46); M. A. Gonsalves, sake and wine importer (Rec. p. 47-48); T. McTighe, sake and wine importer (Rec. p. 51); T. Sumida, sake and wine importer (Rec. p. 53); T. Iwanaga, sake and wine importer (Rec. pp. 53-54); S. Kojima, sake and wine importer (Rec. p. 54); K. Odo, sake and wine importer (Rec. pp. 54-55); M. Kishi, banker and sake user (Rec. pp. 52-53); C. Nakamura, banker's clerk and sake user (Rec. p. 55); T. Murikami, merchant and sake user (Rec. pp. 55-56); J. Oshima, merchant and sake user (Rec. p. 56); M. Kawahara, merchant and sake user (Rec. p. 56); S. B. Fujiyama, merchant and sake user (Rec. p. 56), all testified positively and unequivocally that sake does not resemble in taste any brand of sherry wine.

One of these witnesses, Dr. Humphreys, testified that "of all liquors if sake is like anything it resembles Chinese Sam Shu in taste." (Rec. p. 50).

The Century Dictionary definition of samshoo is thrice fired or distilled ("sam—three, shoo—fire, boil"), an ardent spirit resembling Batavia arrace distilled by the Chinese from rice or from large millet.

As twenty-three witnesses for the Government and twenty-two witnesses for the importer testified against any substantial similitude in taste or odor between sake and a sherry specialty imported by the Government for the purpose of establishing a similitude, and only three witnesses for the Government could be found who would testify unequivocally that wine and sake resemble each other in taste,

W. D. Bigelow (Rec. pp. 94-95);
F. Frohman (Rec. p. 65);
F. P. Ball, Nishimiya case;

it may fairly be claimed that the "additional evidence" on this point did not add strength to the case for the Government.

IS SAKE A SPIRITUOUS BEVERAGE?

The claim of counsel for defendant in error "That sake is a spirituous beverage and dutiable as such at the rate of $2.25 per proof gallon under paragraph 292 of the Act of July 24, 1897," was not made in the Nishimiya case. It was first made in this case and it has been ignored by the Board of United States General Appraisers, and by all four of the courts which have considered the matter in controversy here.

But it is a claim which has been formally and persistently presented before each tribunal in turn, and it is my duty to presume that it will be presented here.

This claim originated in one of the reasons assigned by the Secretary of the Treasury (Mr. Shaw) for withdrawing his order of acquiescence in the Nishimiya case "that sake is an alcoholic beverage; that under our tariff law alcoholic beverages are especially provided for and are a source of considerable revenue."

The ex-Secretary probably confounded alcoholic beverages with spirituous beverages. No such thing as an alcoholic beverage has been "specially provided for" or even mentioned in the tariff law, and alcoholic beverages, as such distinctively are not "a source of considerable revenue" or any revenue at all to the Government.

It is conceded that the alcohol in sake is produced—as in beer and unfortified wines—entirely by fermentation, and that sake contains no added alcohol.

In support of his contention that any beverage containing alcohol, whether produced by fermentation or distillation is a spirituous beverage, counsel for the Government offered the following evidence:

"Chemically I would define a spirituous beverage as any beverage containing alcohol. In order to make a spirituous beverage it is not necessary to add alcohol extrinsically."

Wm. Wenzel, Custom House Chemist. (Rec. p. 61).

"I consider a spirituous beverage any beverage that contains the spirits of alcohol."

Chas. S. Ash, Asst. Supt. Cal. Wine Assn. and Chemist. (Rec. p. 62).

"A spirituous beverage is anything that contains alcohol. I have never regarded, that, to constitute a spirituous beverage, spirits should be added."

Percy T. Morgan, Prest. Cal. Wine Assn. (Rec. p. 62-63).

"A spirituous beverage is anything that contains alcohol. It don't matter whether it is added or produced alcohol. Sherry wine is a spiritnous beverage."

P. C. Rossi, President of Italian Swiss Colony (Rec. p. 64).

"A spirituous beverage is any beverage that contains alcohol. It is immaterial whether

found in the liquid naturally or added subsequently."

Arthur Lachman, Chemist and in Wine Trade. (Rec. p. 65).

"Spirituous beverage is any drink containing alcohol, whether added or not."

F. Frohman, Manager Sales Dept. Cal. Wine Assn. (Rec. p. 65).

The value in this respect as in other respects of the testimony of these six members and officers of the California Wine Association, interested as such in promoting the sale of its wines by maintaining a high duty on sake, may well be questioned in view of the definition of "spirituous" given by lexicographers and courts.

"Spirituous liquor is a liquid specifically distilled in distinction from fermented or brewed."

Standard Dictionary.

"Spirits are the products resulting from the distillation of saccharine liquids which have undergone alcoholic fermentation."

Encyclopedia Britannica.

"Spirituous liquors contain much alcohol distilled, as distinguished from fermented."

Century Dictionary.

"Spirituous: as rum, whiskey, brandy and other distilled liquors, as distinguished from wine and malt liquors."

Webster's Dictionary.

"Ardent spirits is a term applied to liquors obtained by distillation; such as rum, whiskey, brandy and gin."

Worcester's Dictionary.

"Lager beer, as a malt liquor made by fermentation is not included in the term spirituous liquor, the result of distillation."

Sarlls vs. U. S., 152 U. S. 570, 572.

"Beer is not a spirituous liquor within the meaning of the statute."

In re McDonough, 49 Fed. Rep. 360.

"All spirituous liqaor is intoxicating; yet all intoxicating liquor is not spirituous. In common parlance spirituous liquor means distilled liquor. Fermented liquor, though intoxicating, is not spirituous."

Commonwealth vs. Gray. Mass. 501, 502.

"Malt liquors have neither vinous nor spirituous liquors as an ingredient. Spirituous liquors, vinous liquors and malt liquors are not synonomous terms; but each refers to a liquor separate and distinct from the other."

Tinker vs. State (Ala.), 8 So. Rep. 855.

"Fermented liquors are not, in common parlance, spirituous liquors."

State vs. Adams, 51 N. H. 568.

"Spirits is the name of an inflammable liquor produced by distillation. Wine is the fermented juice of the grape produced by fermentation. We cannot so far confound the signification of these general terms as to call wine a spirituous liquor."

State vs. Moore, 5 Blackf. (Ind.) 118.

"Wine is a fermented liquor. Spirits are distilled liquors. This distinction exists not only in common parlance, but is recognized by chem-

ists and philologists. We therefor think that the words 'spirituous liquors' embrace those which are produced by distillation, but not those produced by fermentation."

Caswell vs. State, 2 Humphreys (Tenn.) 402, 403.

"It may be laid down as a general proposition that where the term 'liquor' is used in a special sense, spirituous and distilled beverages are intended in contradiction to fermented ones."

Hollender vs. Magone, 149 U. S. 586.

In view of the foregoing authorities it was probably unnecessary for the importer to call any witnesses to rebut the definition of "spirituous beverages" given by the officers of the California Wine Association; but out of abundance of caution they did so with the following result:

"A spirituous beverage is one in which the distilled essence of any material called a spirit, whether alcohol, ammonia or otherwise is mixed with something else, so the spirit part of it is apparent above the mixture in which it is contained. Fermented drinks contain spirits only when distilled. The spirit of anything is the distillate of it. A spirituous beverage is never made except by the addition of distilled liquor. A spirituous beverage is one which contains more or less of a distilled product known as a spirit, which is not known as a spirit until it is distilled. There is no such thing as a spirit not distilled. It becomes a spirit then. You cannot get a spirit by manufacturing other than distilling."

Charles A. Wetmore (Rec. p. 29).

That the high alcoholic percentage of sake is produced by fermentation alone, and that no distilled spirits are added was conceded by the Government, and proved by its own witnesses.

"Alcohol is not added to wine, beer or sake."

Charles S. Ash (Rec. p. 62).

"In sake brewing the saccharine matter produces all the way from a possible limit of 13% up to a possible limit of 19% of alcohol."

Albert Schneider (Rec. p. 58).

"Beer made in San Francisco has an alcoholic strength of 3 to 8%, sake 16 to 18%."

Wm. Wenzel (Rec. pp. 60 and 61).

The original decision of the United States Board of General Appraisers, in 1894, which decision has never been changed or reversed on this point, was as follows:

"Sake is not spirits manufactured or distilled from grain or other materials, and is not distilled or compounded with distilled spirits. It contains from 11 to 14 per cent. of alcohol developed by fermentation."

T. D. 15392—G. A. 2786.

"SETTLED PRACTICE."

Counsel for the defendant in error say in their brief in this case before the United States Circuit Court of Appeals for the Ninth Circuit:

"If there be doubt, that doubt should be resolved in favor of the Government, for the reason that the duty now imposed has been the rule of action for so many years, it is so well under-

stood and adopted by the commercial world that if there be any error in it time has cured it. Common error makes law 'is a maxim as old as law itself.' * * *

"The business community has adapted itself to the duty now collected. * * * Certainly unless everybody clearly has been mistaken the duty now imposed and which has been imposed for many years under the similitude clause should not be changed."

And the United States Circuit Court of Appeals for the Ninth Circuit from whose decision this case has been brought here says in its opinion:

"The conclusion that there is a similarity between sake and still wine in the material of which they are compounded is somewhat strengthened by the facts before referred to, that in 1894 a claim was made by an importer of sake that it should be classed for duty as a still wine by similitude; the decision of the General Board of Appraisers upholding that contention and the long acquiescence upon the part of importers on this classification. These facts tend strongly to show that in the opinion of merchants interested in the question, the classification thus fixed was correct; and in a case like that before us in which there is a conflict in the evidence the facts referred to are entitled to great weight." (Rec. p. 135.)

I submit that the "commercial world" which prior to June, 1900, dealt in sake was a very, very small world, and the "business community" which "adapted itself" to the sake duty consisted of a very few California Japanese importers who supplied the wants of less than 2,000 Japanese on the Pacific Coast.

Sake is a drink used exclusively by Japanese. It is not agreeable to the Caucasian palate. Except in Honolulu it is imported and sold by Japanese merchants only. If one were to inquire for it at every wholesale and retail Caucasian liquor dealers between Bangor and San Diego and between Key West and Nome he would inquire in vain.

In Honolulu alone where a few American merchants deal in sake the Customs laws of the United States did not take effect until June, 1900, and in March, 1902, the Honolulu sake importers began filing protests against the classification of sake as a wine and they have since continued filing such protests until there are now over 2,200 of them from Honolulu alone on file in the United States General Appraiser's office, on which action is withheld awaiting the decision of this court in this case.

There was substantially no "commercial world" and no "business community" to "acquiesce" in the Woozens decision until after June, 1900. In 1894 when the Woozens decision was made there were but 1,099 Japanese in California.

McCarty's Statistician, 1897-98, page 33.

The incoming of Japanese to California during the succeeding years was 552 in 1895, 112 in 1896, 199 in 1897, and 207 in 1898.

McCarty's Statistician, 1901-2, page 143.

Hawaii was ceded to the United States August 12th, 1898, and on June 14th, 1900, when annexation was completed and the Customs laws of the United States first became operative there, the number of Japanese in Hawaii was 61,111, in California 10,151 and in the remaining Western

States and territories 12,855, making a total of 84,117 in 1900 against 1,099 in 1894, when the Woozens decision was made.

McCarty's Statistician, 1905-6, page 111.

In United States vs. Proctor, T. D. 27,151, it was held that a Department ruling, which had become a settled practice, would not be interfered with, but in Peabody vs. Stark, in 16 Wallace 240, this court said, "We do not hold such ruling as in general obligatory upon us."

But if the doctrine of "acquiescence by those dealing in the article in the commercial world" is to be invoked, the Government can gain nothing by the claim. The Woozens decision made by the Board of United States General Appraisers in 1894, was merely a decision that as between being a wine by similitude or a distilled liquor, sake was not a distilled liquor, but was as claimed by the protestant, a wine by similitude.

But in the Internal Revenue Department there has been a line of decisions to the effect that as between being a wine by similitude or a beer, sake is a beer.

INTERNAL REVENUE DECISIONS.

In 1901, a few months after the United States Customs laws took effect in Hawaii, same Japanese merchants who desired to engage in the manufacture of sake there, applied to the Internal Revenue Department to learn what it was necessary to do. To this application the United States Commissioner of Internal Revenue, in January, 1902, replied as follows:

"The fermented beverage produced from rice and known as sake is regarded as a fermented li-

quor under internal revenue laws. Beer license must be taken out by manufacturers."

Letter of U. S. Commissioner of Internal Revenue Yerkes to Collector at Honolulu, January, 1902.

This decision was in line with previous decisions made of the Internal Revenue Department, as follows:

"Rice beer fermented is a fermented liquor made from a substitute for malt. * * * The special tax of a brewer is required to be paid for its manufacture for sale, and dealers therein are required to pay special tax as malt liquor dealers."

Int. Rev. Record, Vol. 34, page 253.

"A liquor made from barley malt fermented by means of a wine yeast, is a fermented malt liquor for the manufacture of which for sale the special tax of a brewer is required to be paid, and on which tax is imposed by Section 3339 Rev. Stat., notwithstanding the fact that by use of a wine yeast instead of beer yeast it has the appearance and taste of wine."

Int. Rev. 19025.

Under these decisions sake breweries were established and have ever since been running at Berkeley and at San Jose, in California, paying beer licenses and a beer duty on the product.

To claim that sake imported into the United States should pay a customs duty of fifty cents per gallon, while sake made in the United States should pay a duty of about three cents per gallon, because such was from 1894 to 1900 the "settled practice" of a "commercial world" of two thousand people out of eighty millions, is giving the doc-

trine of commercial adaptation a very wide scope.

Since March, 1902, there has been no acquiescence, but on the contrary continued protests from sake importers and the claim now that the failure of the importers to protest for 21 months between June, 1900, and March, 1902, constituted a commercial acquiescence in the proposition that sake is a wine by similitude is not a claim I submit that will commend itself to this court.

IS SAKE A WINE BY COMMERCIAL DESIGNATION?

Counsel for the defendant in error in their brief in this case before the United States Circuit Court of Appeals for the Ninth Circuit, under the head of "Sake in a Commercial Sense is a Wine," say:

> "That the Japanese themselves consider sake a wine is shown by Illustrative Exhibits A and B consisting of a bottle of imported rice wine and a circular accompanying same setting forth the virtues of the wine (Transcript, p. 119). While this, of course, is not evidence that the article is a wine, either actually or commercially, it is referred to as being significant of the nature of the article as considered by the people most familiar with it—its makers. Exhibit A (labelled 'sake') is an old bottle of sake evidently shipped before the claim now made was fully understood by the Japanese shippers."

No statement of alleged facts could be more inaccurate and no deduction from the real facts could be more unfair.

In the hearing of this case the only witness for the Government who testified that sake is a wine by commercial designation was John T. Dare, ap-

praiser of the Port of San Francisco. He was handed the bottle, Exhibit A, marked rice wine. He testified:

> "Rice wine is a common term, it is sometimes on the invoice as well as on the label on the bottle, but as a general thing it is called Japanese sake; that is the term used more frequently than any other term." (Rec. p. 66.)

In answer to this the importer adduced the following:

H. J. Johnston: "Am ship and custom house broker in business in San Francisco from 1887 to 1898. Have dealt in sake as a broker. Have seen it labelled sometimes on bottles and sometimes on tubs. On the tubs there was no brand except Japanese characters, which I could not read. On the bottles I have seen the Japanese characters and sometimes 'sake.' I never saw it labelled rice wine until yesterday when I saw it here (Exhibit A) and I have seen thousands of bottles. I have gone around to all the importers to get samples of sake and I never saw any rice wine. I made a point of scrutinizing the labels very closely. (Rec. pp. 33 and 34.)

D. H. Lewis: "Am wine and liquor dealer in Honolulu. My house imports sake to a considerable extent. Sometimes it is designated on the invoices as sake, and some dealers designate it as rice sake. I never saw a bottle of sake labelled wine." (Rec. pp. 45 and 46.)

J. McM. Farrington: "Am examiner in the Customs service at New York. Sake is the distinct name for a Japanese article of the character of a beverage." (Rec. p. 22.)

George O'Neill (employed by W. C. Peacock & Co., liquor merchants, Honolulu): "Have never

known sake to be designated by any other name. Have never known of any that we have imported in the name of rice wine or by any other name than sake. (Rec. p. 42.)

M. A. Gonsalves: "Member of Gonsalves & Co., Honolulu, dealers in wines, liquors and groceries. In that business twenty years. Do not import any sake called rice sake. Our invoices read sake. No invoices that read rice wine" (Rec. p. 48.)

There is no pretence that sake imported in tubs is ever labelled rice wine, or anything but "sake." Custom House statistics show that out of every one million gallons of sake imported into the United States only 6,500 gallons comes in bottles. In Honolulu, where seventy per cent. of the entire sake importations are made, it appears that no single bottle labelled "rice wine" has ever been received. If the evidence to this effect could have been controverted it would have been easy for the Government to have done so with the Custom House officials at Honolulu. If every bottle of sake imported into San Francisco had been labelled rice wine, which, according to the testimony of Custom House broker H. J. Johnston is far from being the case, it follows that the designation of "rice wine" would have been applied to only two-tenths of one per cent. of all the sake importations or two thousand gallons out of every one million gallons.

What kind of "commercial and general designation" can be constructed out of these facts?

I append in this connection some definitions of sake given by lexicographers and by courts.

> "Sake. A kind of beer which the Japanese make from rice."
>
> Chamber's Enclopedia.

"Sake. The native beer and common stimulating drink of the Japanese. It is made from rice."

Cyclopedia Americana.

"Sake. The rice beer of the Japanese."

New International Cyclopedia.

"Sake. A Japanese fermented liquor made from rice."

Century Dictionary.

"Sake, A fermented liquor brewed from rice."

Japanese and English Dictionary.

"Sake is a liquor made from rice by a process of fermentation."

T. D. 15,392, G. A. 2,786.

"Sake is a beverage made from rice by processes similar to those employed in making beer."

U. S. vs. Nishimiya, 137 U. S. 396-398.

"Among the ancients the term wine was applied to all fermented beverages containing alcohol. Herodotus says 'the Egyptians being without wine made wine from barley.' Pliny says 'the Egyptians invented a wine made from barley.' Tacitus speaks of the ancient Germans using a liquor fermented from barley, made into a kind of resemblance of wine, and the German warriors would get drunk on the barley wine. But if beer is like wine in its appearance and effects, it is plainly not a wine either in its popular or technical meaning."

Sarlls vs. U. S., 152 U. S. 576.

MICROBE SIMILITUDE.

Resemblance in the microbes of the yeast with which vinous and malt liquors are fermented is not one of the similitudes prescribed by the Tariff Law. Nevertheless counsel for the Government attempted to establish a similitude between sake and wine by showing a resemblance between the shape of the microbes of unused wine yeast, and the shape of microbes of yeast which had been used in making sake.

Professor Francis Wyatt was employed by the Government for such purpose. He had a pure culture of Rhine wine yeast and a pure culture of lager beer yeast. He had no sake yeast, but only the sediment of yeast found in sake, and each of these he magnified four hundred times.

He found that the microbes in the beer yeast were oval or round in form, while those in the wine yeast resembled strings of sausages. He stated that the microbes in the sake sediment were sausage shaped (Transcript, p. 157). But on cross-examination he admitted that he does not base his opinion upon a comparison of wine yeast and sake yeast. He says: "*Judging from the taste* and general characteristics of sake, the same yeast has been employed in its production as that which is used in the production of sherry wine." Transcript, p. 158.)

The fairness of a comparison between the microbes of a pure culture yeast, which has not as yet been used to ferment a saccharine fruit juice into alcohol, and the microbes in the sediment of a yeast which has done its work of converting the starch of a grain into sugar, may well be questioned; especially in view of the fact that the yeast used generally in making wine is not a cul-

tured yeast, but a wild yeast existing in the skin of the fruit. It may also be properly remarked in this connection that Professor Wyatt never analyzed any sherry wine yeast. He analyzed a yeast said to be used in making Rhine wine, and it is not pretended by the defendant in error that there is any resemblance in taste, or otherwise, between Rhine wine and sake.'

QUANTITY OF ALCOHOL NOT THE TEST.

It was claimed by counsel for the Government in their argument before the United States Circuit Court of Appeals for the Ninth Circuit:

> "That in all articles in which alcohol enters as an ingredient, the tax is graduated by the percentage of alcohol."

The tariff law does not sustain this assumption. Beers containing four per cent. of alcohol pay the same duty as ales containing eleven per cent. of alcohol. Wines containing seven per cent. of alcohol pay the same duty as wines containing twenty per cent. of alcohol, and cordials containing thirty per cent. of alcohol pay the same duty as brandies containing eighty per cent. of alcohol.

It was further claimed by counsel for the Government that if sake should be classed as a non-enumerated manufactured article dutiable at twenty per cent. *ad valorem* or ten cents per gallon, the result would be that some great "captain of industry" would embark in the business of importing sake to this country and extracting the alcohol from it, because six gallons of sake containing one gallon of alcohol would be brought here at a dutiable charge of only sixty cents, while the duty on alcohol is two dollars and twenty-five cents per gallon.

Should any captain of industry engage in such an enterprise it would not be difficult to predict his financial end. He would pay fifty cents per gallon or three dollars for six gallons of sake in Japan. He would pay three cents per gallon freight and ten cents per gallon duty, so that his six gallons of sake would cost him three dollars and seventy-eight cents when landed. The only way by which he could extract the alcohol from it would be by distillation, and for this privilege he would pay one dollar and fifteen cents per gallon to the Internal Revenue department. The "captain of industry's" gallon of alcohol would have cost him four dollars and ninety-three cents per gallon, while alcohol, either imported into this country or made here, could be bought for one-half that sum.

INTEREST AND COMPETENCY OF WITNESSES.

The point is made by Government counsel that ten of the twenty-eight witnesses for the plaintiff in error were sake importers, and protestants directly interested in the result of this contest. Interest in the result is a fact to be considered to some extent in determining the weight to be given to the testimony of a witness, but where such witness is fully corroborated by the testimony of a number of disinterested witnesses, his interest in the result will not affect the degree of credibility to be accorded him. The ten sake importers in Honolulu, who testified that sake and sherry wine do not resemble each other in taste, were corroborated by three expert wine tasters in San Francisco, Wetmore, Falkeneau and Wilhelmj, by Dr. Takamine in New York, by Humphreys, physician, by

Hertsche, hotel manager, by Kishi, banker, by Nakamura, banker's clerk, and by Murakami, Oshima, Kawahara and Fujiyama, general merchants, in all twelve disinterested witnesses. With respect to these last four witnesses counsel for the Government suggested that they were not wine experts. I submit that men who have used sake constantly for many years were quite as competent to pass upon its substantial similarity in taste to wine with which they were not familiar as experts, as were men who had dealt in wine for years competent to pass upon its resemblance in taste to sake which they had never tasted but once or twice. Certainly the two bankers and four merchants in Honolulu who were experts in sake but not in wine, were as competent witnesses as the Government witnesses who were not experts in either wine or sake. If the interest of witnesses in the result is to be a determining factor in this contest the Government has the worst of it. Of the 27 witnesses for the importer, 10 were sake protestants and 17 were entirely disintersted. Of the 38 witnesses for the Government seven were California wine makers and dealers who supposed themselves to be interested in maintaining an excessive duty on sake, so that it might not come in competition with their non-drinkable sherry material, or with the "wine" made from it. Seven were New York importers who supposed themselves to be interested in maintaining a high duty on sake in order that it might not come in competition with the Spanish sherries; thirteen were beer makers who supposed themselves to be interested in preventing sake from coming in competition with the malt liquors which they manufactured; and eight were Government employees, presumably anxious to promote the interests of their employers. The only

absolutely disinterested witnesses offered by the Government were three—Schneider, a teacher of botany in San Francisco; Nishimiya, a restaurant keeper, and Kawaguchi, a tea importer in New York, and the testimony of these latter two was in favor of the importers. I use the phrase "supposed themselves to be interested" advisedly, for in reality they were not interested. Sake is used as a beverage exclusively by Japanese who do not extensively patronize wines or beers, and it is not in the least probable that any reduction in the price of sake would commend it to the Caucasian palate, any more than a cheapening in the duty on Chinese blouses and shoes would induce Americans to adopt the coolie costume.

CONFLICT OF EVIDENCE.

The court from whose decision this writ of certiorari is taken says that in this case there is "a conflict of evidence." On what point in this controversy is there, I respectfully inquire, any conflict of evidence?

Is it with respect to the material from which sake is made?—both parties concede that it is made from rice and water.

Is it with respect to the process of its manufacture?—the defendant in error concedes that the process of manufacture is described correctly by the witnesses for the plaintiff in error.

Is it with respect to the chemical constituents of the finished article? The witnesses for both parties testify that sake, like beer, contains maltose and dextrine, both of which are absent from wine, and that sake does not contain malic and tartaric acid and dextrose, all of which are contained in wine.

Is it with respect to stability? The government does not dispute the fact that wine improves with age, while sake spoils in a few months.

Is it with respect to color? It is not denied that sake resembles white wine and also resembles ale, beer and cider in color.

Is it with respect to use or manner of use? Both parties concede that sake, like wine, is drank for flavor and exhilaration, and that unlike wine it is generally heated before being drank.

Is it with respect to alcoholic strength? The plaintiff in error concedes that in this particular sake resembles a still wine.

Is it with respect to commercial designation? The testimony of one witness (a government employee with one bottle labelled rice wine) that while it is generally called sake yet the bottled sake is in a majority of instances labelled rice wine, can scarcely be called a serious refutation of the testimony of five sake importers and a Customs broker that it is not so designated, and coupled with the fact that only 2,000 gallons of sake out of one million gallons is imported in bottles.

Is it with respect to acquiescence by importers and dealers? Can that be called an acquiescence which was participated in by only 2,000 people out of 80,000,000?

The sole point on which there is any "conflict of evidence" is as to taste. On this point four government employees and three brewers testify that sake and wine resemble each other in taste and twenty-one witnesses for the importer testify that they do not so resemble each other.

Six California wine makers testify for the government that sake resembles in taste a non-potable liquid called "sherry material," used for manufacturing purposes and out of which an imitation

sherry is made. Five New York wine importers testify for the government that sake "*somewhat*" resembles sherry; that it has a *faint resemblance* to a wine never imported into this country; that it resembles "a sherry spoiled by sea water," a "sherry that has gone wrong" and that "any wine merchant who would buy it for sherry ought to go out of business"; and six brewers and fermentologists testify for the government that sake has "a peculiar aroma," a "strange taste somewhat" like sherry, "a peculiar flavor," "a peculiar oriental flavor," a flavor "characteristic of sake and nothing else."

It is, I submit, conclusively shown from the record that the United States Board of General Appraisers, the United States Circuit Court for the Southern District of New York, the United States Circuit Court of Appeals for the Second Circuit and the United States Circuit Court for the Northern District of California, all four reached the conclusion that the similitude of sake to wine in alcoholic strength was overcome by its dissimilitude in material from which made, in process of manufacture, in chemical composition, in taste, in odor, in stability and in manner of use.

And upon precisely the same showing and with no new evidence that was not cumulative and cumulative in behalf of the importer, the United States Circuit Court of Appeals for the Ninth Circuit reached the opposite conclusion that the dissimilitude of sake to wine in the seven particulars named was overcome by its similitude in alcoholic strength.

CONCLUSION.

The decision of 6 State Supreme Courts and of 2 Federal Circuit Courts and of the U. S. Supreme

Court are to the effect that sake is not a spirituous beverage. The testimony of 5 importers and 2 Government appraisers shows that sake is not a wine by commercial designation. Statistics of Japanese immigration show that the commercial world has never acquiesced in its classification as a wine. The rulings of the Internal Revenue department show that there it has for years been classed and taxed as a beer. The customs laws show that the quantity of alcohol in a beverage is not the test by which it is classified. The evidence conclusively shows that in material from which made, in process of manufacture, in chemical composition, in stability in taste and in manner of use there are wide dissimilitudes between sake and still wine.

The sole similitude between wine and sake is in alcoholic strength. The General Board of Appraisers, the United States Circuit Court for the Southern District of New York, the United States Circuit Court for the Second Circuit and the United States Circuit Court for the Northern District of California all decided that the one similitude in alcoholic strength was not sufficient as against the many dissimilitudes to establish a substantial similitude between sake and wine. The United States Circuit Court of Appeals for the Ninth Circuit decided that the one similitude of alcoholic strength overcomes all dissimilitudes.

I submit that the record on its face shows that the United States Circuit Court of Appeals for the Ninth Circuit erred in reversing the judgment of the United States Circuit Court for the Northern District of California.

THOMAS FITCH,
Of Counsel for Petitioner.

Supreme Court of the United States

OCTOBER TERM 1909.

KOMADA & COMPANY,
Petitioner,

v.

THE UNITED STATES OF AMERICA,
Respondent.

SUPPLEMENTAL BRIEF FOR PETITIONERS.

The statement of the case, the history of sake litigations and the assignment of errors are fully set forth in Mr. Fitch's brief and will not be repeated here. There are some phases of the case which seem to merit some further discussion and which will be taken up briefly.

POINT I.

It was palpable error for the Court of Appeals to review the decision of the Circuit Court in this case upon questions of fact.

On Page 133, Fol. 247 of the record, the District judge who wrote the opinion in the Court of Appeals said:

"1. The question whether a non-enumerated article is similar to one named in the Tariff Act and for that reason subject to a like duty, is one of fact.

Wills v. Russell, 100 U. S., 621.

Herrman v. Arthur, 127 U. S., 363.

And the finding of the Board of General Appraisers, as to that fact, will not be disturbed by the Court, unless clearly contrary to the evidence, or when in the proceeding for a review of its decision, evidence of a material character is presented to the Court. In the present case the Court has before it additional evidence not before the Board of General Appraisers, and the record is much more full and complete than that before the Circuit Court of the Southern Dsitrict of New York, and the Circuit Court of Appeals for the Second Circuit, in the case of U. S. vs. Nishimiya, above referred to. We must therefore determine the question of similitude, here presented, without aid from the ordinary presumption which would otherwise attach to the finding of the Board of General Appraisers, and the very great weight to which the decision of the courts, just mentioned, in the case of U. S. vs. Nishimiya, would be entitled—if the record now before us was the same as that submitted to those courts in that case."

It is true that evidence of a material character was presented to "the court" and that "the court" had before it additional evidence not before the Board of General Appraisers, but in what court was that evidence introduced? The only court where it could be introduced, namely, the United

States Circuit Court for the Northern District of California. That court had before it all the evidence in the case and having such evidence before it made a decision upon the facts it found. (Rec. p. 129, Fols 236 and 237.)

> "In some of these elements I have mentioned 'sake' resembles beer more than it does wine, but in final comparison in material, quality and use, a substantial resemblance to either wine or beer disappears."

Referring to the so-called new evidence, the Court said:

> "There is more evidence on both sides in the present case than there was in the Nishimiya case, but I do not find that it has any more weight in establishing a similitude to either wine or beer. The general case presented seems to me to be substantially the same."

The law is well settled that neither the Court of Appeals nor the Supreme Court will disturb the findings of fact in the Circuit Court unless they are wholly without evidence to support them, which is not pretended here.

In Hathaway v. First National Bank of Cambridge, 134 U. S., 494 (at page 498) this court said:

> "The first three assignments of error allege errors merely in the findings of fact by the court. Those errors are not subject to revision by this court, if there was any evidence upon which such findings could be made."

In Lehnen v. Dickson, 148 U. S., 71 (at page 73) Mr. Justice Brewer said:

> "We must accept the general finding as conclusive upon all matters of fact precisely as the verdict of a jury."

To the same effect are Martinton v. Fairbanks, 112 U. S., 670;

Union Pacific Railway Company v. United States, 116 U. S., 154 (at page 157);

The Francis Wright, 105 U. S., 381 (at page 387).

The same rule has been laid down by the Courts of Appeals in the various circuits (and by none more emphatically than in the ninth circuit) as appears by the following authorities:

1st Cir. The Columbian, 100 Fed. Rep. 991, at p. 995.

2nd Cir. The Gladestry, 128 Fed. Rep. 591.

3rd. Cir. Met. Bank of Pittsburg v. Rogers, 3 U. S. App. 406 at p. 411.

4th Cir. West Va. Northern R. R. Co. v. U. S., 134 Fed. Rep. 198, at p. 202.

4th Cir. Am. Bridge Co. of N. Y. v. Camden Interstate R. R. Co., 135 Fed. Rep. 323, at p. 331.

5th Cir. Morris v. Canda, 52 U. S. App. 180, at p. 182.

6th Cir. Buckingham v. Estes, 128 Fed. Rep. 584. at p. 587.

7th Cir. In re Antigo Screen Door Co., 123 Fed. Rep. 249, at p. 254.

8th Cir. Gorham Mfg. Co. v. Emery Bird Thayer Dry Goods Co., 104 Fed. Rep. 243, at p. 244.

9th Cir. Wolff v. Wells Fargo Co., 115 Fed. Rep. 32, at p. 34.

9th Cir. Gaffner v. Pigott, 116 Fed. Rep. 486, at p. 487.

9th Cir. Lilienthal v. McCormick, 117 Fed. Rep. 89, at p. 97.

9th Cir. Am. Sales Book Co. v. Bullivant, 117 Fed. Rep. 255, at p. 260.

9th Cir. Moore v. Moore, 121 Fed. Rep. 737, at p. 738.

9th Cir. Eureka Co. Bank v. Clark, 130 Fed. Rep. 325, at p. 326.

9th Cir. Last Chance Mining Co. v. Bunker Hill, &c., Mining, &c., Co., 131 Fed. Rep. 579, at p. 587.

The general rule applicable in the courts is strengthened by the language of the statute relating to appeals from the Board of General Appraisers in customs cases. The Customs Administrative Act, Section 15, after providing for the taking of additional evidence in the Circuit Court upon the application of either party, says:

> "And such further evidence with the aforereturns shall constitute the record upon which said Circuit Court shall give priority to and proceed to hear and determine *the questions of law and fact* involved in such decision."

Doubtless the Circuit Court itself would have been required to accept the findings of fact of the Board of General Appraisers were it not for the fact that *the statute permitted additional testimony to be taken in the Circuit Court after the decision of the*

Board. When the statute comes to provide for appeals from the decision of the Circuit Court it says:

> "Said Supreme Court shall have jurisdiction and power to review such decision and shall give priority to such cases and *may affirm, modify or reverse* such decision of such Circuit Court and remand the case with such orders as may seem to it proper in the premises which shall be executed accordingly."

There is not a word about the Supreme Court reviewing the facts. There is not a syllable to indicate that Congress intended to reverse, as to customs cases, the unbroken practice of the Supreme Court to confine its review to questions of law. When the Circuit Court of Appeals Act was passed in 1891, the provisions of Section 15 of the Customs Administrative Act providing for appeal to the Supreme Court became applicable to appeals to the Court of Appeals, to which final jurisdiction was given in reviewing cases, subject only to the general right of this Court to issue writs of certiorari.

So that not only under the well settled rules of this court and of the Court of Appeals but *under the language of the Special Act relating to customs appeals*, the Court of Appeals had no right to reverse the Circuit Court upon questions of fact.

POINT II.

The similitude clause was not properly applicable to the merchandise in question at all.

There has been apparent of late in the inferior courts of the United States a disposition to have

frequent recourse to the similitude law and to apply it in cases to which it should not be applied. The decisions of this court upon the similitude law (all of which have been carefully considered in the preparation of this brief) lend no support to the theory that it may be resorted to in all cases of doubtful classification.

The true intent, purpose and scope of the similitude law is pointed out by this court in the case of Stuart v. Maxwell, 16 Howard 150, as follows:

> "It was designed to afford rules to guide those employed in the collection of the revenue in certain cases likely to occur, not within the letter, but within the real intent and meaning of the laws imposing duties, and thus to prevent evasions of those laws. *Manufacturing ingenuity and skill have become very great; and diversities may be expected to be made in fabrics adapted to the same uses and designated to take the same places as those specifically described by some distinctive marks, for the mere purpose of escaping from the duty imposed thereon.* And it would probably be impossible for Congress by legislation to keep pace with the results of *these efforts of interested ingenuity.* To obviate, in part at least, the necessity of attempting to do so, this section was enacted."

Again on page 162, the Court says:

> "Suppose an article is designedly made to serve the uses and take the place of some article described, but some trifling and colorable change is made in the fabric or some of its incidents. *It is new in the market. No man can say he has ever seen it before, or known it under any commercial name.* But

> it is substantially like a known article which is provided for. The Law of 1842 then declares that it is to be deemed the same, and to be charged accordingly; that the Act of 1846 has provided for it under the name of what it resembles."

In Fisk v. Arthur, 103 U. S. 431 (at page 434) this court, after quoting from the foregoing extracts from the decision in Stuart v. Maxwell, said:

> "The effect of this is to hold that such an article 'is provided for under the name of what it resembles.' Here, all manufactures of cotton are provided for in the act of 1864 and its amendments, and the article now in question, in material, quality, and texture, as well as the use to which it is to be applied, is precisely like cotton shirtings. As cotton largely predominates, we think the burden was cast on the importer to show that the change was substantial and *not for the purpose of evading the requirements of the law*. It is not pretended that the new article had acquired any distinctive name in commerce, or that it was in any material respect different from similar goods manufactured entirely of cotton. The only difference between this case and that of Stuart v. Maxwell is that here it is claimed the articles are enumerated as mixed goods, while there that they were not enumerated at all. There it was held that they were not non-enumerated because they were substantially cotton goods, and here we think for the same reason they are not mixed goods."

Again, in Arthur v. Fox, 108 U. S. 125 (at page 129) this court, carrying out the same idea as to evasions of the Tariff law, said:

> "To say that goods made of cow or calf hair and cotton, which were in all respects like goods made of goats' hair and cotton, and applied to the same uses, often bearing the same name in commerce, were to be dutiable at one rate as manufactures of cotton, when the goats' hair goods were assessed at a much higher rate, "*would be to encourage evasions of the descriptive terms in the tariff laws 'by some trifling or colorable change in the fabric or some of its incidents.'*"

The same idea is found in Herrman v. Arthur, 127 U. S. 363, where the action of the court below in directing a verdict in favor of the government against importers on the ground of similitude was reversed, the court using the following language:

> "In the present case, the samples of goats' hair goods introduced by the defendant as the standard of comparison, to make out the similitude spoken of in Section 2499, were all of them mohair goods, two of which samples were worth over eighty cents a pound, and those subject, under Schedule L, to the rate of duty imposed in the present case upon the goods of the plaintiffs; while it was proved that the plaintiffs' goods in twelve of the cases cost under forty cents a pound, and in the remaining case cost over forty and under sixty cents a pound. Thus, as a matter of law, in the present case, the plaintiffs' goods, of such in-

> ferior value and material, were compared with costly mohair goods, and the duty assessed on them was held to have been properly charged.
>
> "We are of opinion that the question of the similitude was one of fact, which should have been submitted to the jury under proper instructions."

We respectfully insist that under the rulings of this court it should be held that the similitude law was intended to apply only to articles unknown at the time of the passage of the Tariff Enactment and colorably changed or altered so as to escape the imposition upon them of the taxes which Congress had clearly intended they should pay; that as to articles known to Congress at the time it legislated with reference to the taxes on imports for which no special or general provision was made in the tariff law, it was intended that they should pay duty at 10% if raw, and 20% if manufactured, under the general clause providing for non-enumerated articles; and that it was never the intention of Congress that as to such articles strained constructions should be given to the similitude law to bring them within the provision of some special or general enumeration in the tariff act.

Strained construction of the similitude law for the purpose of bringing under it all articles for which Congress has not seen fit to make any provision is mischievous. It may, and frequently does, result in making articles pay duties which are in some cases absurdly high and in others absurdly low. If customs officers and courts confine themselves in the application of the similitude law to the definition of its object and purpose

laid down by this court in Stuart v. Maxwell, the intent of Congress will be much more generally carried out and disputes and litigation greatly diminished.

POINT III.

Sake is not assimilated to still wines under any proper and reasonable construction of the similitude section.

The similitude section (Section 7 of the Tariff Act of July 24, 1897) in force at the time of this importation so far as pertinent, reads as follows:

> "That each and every imported article, not enumerated in this act, which is similar, either in material, quality, texture, or the use to which it may be applied, to any article enumerated in this act as chargeable with duty, shall pay the same rate of duty which is levied on the enumerated article which it most resembles in any of the particulars before mentioned; and if any non-enumerated article equally resembles two or more enumerated articles on which different rates of duty are chargeable, there shall be levied on such non-enumerated article the same rate of duty as is chargeable on the article which it resembles, paying the highest rate of duty."

The similarity or resemblance which will justify the application of the similitude clause must be substantial.

> Stuart v. Maxwell, 16 Howard, 150;
> Arthur v. Fox, 108 U. S. 125;
> Fisk v. Arthur, 103 U. S. 431.

In the last case cited it was said:

> "It is not pretended that the new article had acquired any *distinctive name* in commerce or that it was *in any material respect different* from similar goods manufactured entirely of cotton."

In this case it is not pretended that the article in question did not have a distinctive commercial name, or that it was not in any material respect different from still wines.

The mere fact that an article resembles another article more than it resembles anything else will not justify the invocation of the similitude clause.

Murphy v. Arnson, 96 U. S. 131.

Let us now consider whether there was any substantial resemblance between sake and still wines in any of the four particulars mentioned in the similitude law.

The term "texture" used in the law is clearly not applicable to beverages and may, therefore, be at once eliminated from the discussion.

We have left three particulars, namely, material, quality, and use.

With respect to material, sake is made from rice and wine from grapes. It would certainly be a wide stretch of the imagination to say that these two materials resembled each other to the extent of substantial similarity.

The decision of the Court of Appeals refers to this subject and says (p. 134, fol. 250):

> "This difference, however, in the original materials from which sake and wine are made, is not, in our opinion, controlling, as the law in fixing the rate of duty concerns itself with the condition of the article at the time of importation" (citing United

> States v. Shoverling, 146 U. S. 76; U. S. v. Wotton, 53 Fed. 344)."

Neither of the cases cited involved any construction of the similitude clause, and we submit that there is nothing in either of them that justifies the proposition that the word "material" in the similitude clause does not mean the material out of which or from which an article is made.

The Court of Appeals goes on to say (p. 135, fol. 251):

> "The pertinent substance in both is alcohol, and, in our opinion, notwithstanding the difference in minor ingredients, there is, by reason of the similitude in alcoholic strength, a substantial similarity in the materials which enter into the composition of the two articles."

It is respectfully submitted that this stretching of the word "materials" to mean alcoholic strength in beverages made from various substances, in the treatment of which, by processes of fermentation or distillation, alcohol has been produced, is a sweeping interpretation of the word "material" for which there is no justification. Such an interpretation would make similar in material, whiskey made from grain, brandy made from apples, beer made from hops, still and sparkling wines made from grapes, liqueurs made from wormwood, caraway seeds, &c.

It cannot be supposed that Congress intended the word "material" in the similitude law to be given any such interpretation. Words in statutes should not be so strained for the purpose of increasing taxation. If it be not entirely clear that such an interpretation of the word "materials" is

not justified, the most that the Government could possibly claim would be that the question was one of doubt, and such questions must be decided in favor of the importer.

> American Net & Twine Co. v. Worthington, 141 U. S. 468.

Another criterion established by the statute is that of use, the precise language of the statute being "the uses to which they may be employed." Referring to this criterion, the Court of Appeals says, at p. 135:

> "We think there is also a similitude in use between sake and still wine, both being drunk for purposes of exhilaration, and both are capable of producing intoxication; although intoxication from the use of sake passes off more quickly than that produced by wine."

We respectfully submit that the term "use" in the statute is not employed in any such broad sense as that which the learned Court of Appeals seems to have adopted. If the word "use" be interpreted in this sense, then sake is similar to almost all alcoholic beverages named in Schedule H providing for wines and liqueurs, for they are all drunk for purposes of exhilaration, and we suppose are all capable of producing intoxication. In this sense sake is then as similar to whiskey and brandy, champagne, benedictine, curacoa, chartreuse, and kimmel, as it is to still wines. We submit that the term "use" should have a narrow and restricted meaning, under which one article might be used as a substitute for the other. Upon the evidence, sake is a beverage used exclusively (or nearly so) by Japanese. There is not a par-

tiele of evidence to justify the belief that Americans are using sake or show any tendency to do so. There is no more reason to suppose that our people will adopt sake as a beverage than that they will adopt birds' nests or chop suey as articles of food. Is there any reason to suppose that when Congress re-enacted in 1897 the provision for still wines which had been contained in previous statutes for many years, and enacted a similitude law in substantially the same words originally used in the Act of 1842 and repeatedly re-enacted, it was contemplated that these should apply to a beverage named sake of a peculiar character, used by Japanese? There is no more reason for holding that sake should be assimilated for tariff purposes to still wines because they are both drunk for purposes of exhilaration than there is why a sealskin coat should be assimilated to a knit woolen sweater because they are both worn for the purpose of keeping out the cold, or that an English pheasant should be assimilated to a piece of Canada mutton because they are both eaten to satisfy the pangs of hunger.

We have left of the three criterions possibly applicable under the statute, only the word "quality."

To this particular criterion no reference is made by the Court of Appeals in its decision, but the government has stoutly contended all through this litigation that there is a similarity in quality between sake and still wines, and in order to justify this contention has treated the word "quality" for the purposes of this case, as meaning alcoholic strength.

The term "quality" is one that has several definitions and may be use in several senses. It is defined (Standard Dictionary) as "an element of anything distinguishing character; essential prop-

erty; a moral trait or characteristic; social rank or status, etc." But the definition which indicates the sense in which it is used in the Tariff is as follows:

> "Degree of excellence; relative goodness; grade; as, sugar of good or bad quality."

It is clearly in this last sense and in no other that the word "quality" is used in the similitude section and this court has so recognized it.

In Arthur v. Fox, 108 U. S. 135, this court (speaking through Chief Justice Waite) said:

> "They are made of cotton and cowhide, and are evidently of *equal quality* to the manufactures of cotton and goats' hair, because in this case they are charged with the duty of 50 cents per pound, thus indicating a value of 80 cents a pound or over which calls for the highest duty per pound put on the goats' hair goods."

In Herrman v. Arthur, 127 U. S. 364 this court speaking through Blatchford, J., reversed a judgment obtained below upon the application of the similitude clause, using the following language:

> "In the present case, the samples of goats' hair introduced by the defendant as the standard of comparison, to make out the similitude spoken of in Sec. 2499, were all of them mohair goods, two of which samples were worth over 80 cents a pound, and thus subject, under Schedule L, to the rate of duty imposed in the present case upon the goods of the plaintiffs; while it was proved that the plaintiffs' goods in twelve of the cases cost under 40 cents a pound, and in the remaining case cost over 40 and under 60 cents a pound. Thus, as a matter of law,

in the present case, *the plaintiffs' goods, of such inferior value and material, were compared with costly mohair goods* and the duty assessed on them was held to have been properly charged.

"We are of opinion that the question of the similitude was one of fact, which should have been submitted to the jury, under proper instructions."

To meet the exigencies of this case, the government has tried to stretch the meaning of the word "quality" to make it include taste and alcoholic strength. We submit that it is quite unreasonable and absurd to suppose that Congress ever intended the application of the similitude clause to any articles of imported merchandise to depend upon the *taste of articles.* Some collectors might think sake tasted like beer; some might think it tasted like wine; some might think it tasted like neither. And if the action of any collector was to be reviewed by higher authority how was it to decide the question? Suppose in a Board or court of three, one member thought an article tasted like one enumerated article, the second member thought it tasted like another enumerated article and the third member thought it tasted like still a third enumerated article. How could such a case be decided? From the number of samples which the government seeks to place before this court it would seem that they expect the learned judges of this high tribunal to taste samples of sake and samples of a certain grade of sherry wine and to base the decision as to the classification of this article upon the impression thus derived. The witnesses in the case differed widely among themselves as to the taste of sake as compared to beer and wine, and as to the relative resemblance between sake and one kind of wine

and that of two or three particular kinds of articles undisputedly wines as among one another. Upon what authority goods can be said to be of the same quality because they taste alike we do not know. A very high grade of one article may taste like a very low grade of another article. Can the two articles as a class then be said to be similar in quality?

The absurdity of this attempt to define the word "quality" as "taste" is further emphasized in this case by the fact that in order to add plausibility to its contention that sake resembled wine in quality, the government, seeing no hope of success in comparing sake with any wine commonly used in this country and the subject of importation, was obliged to make a special importation of a very low grade of sherry wine produced in Spain, but not the subject of importation into this country at all, and called as witnesses in its own behalf in the Circuit Court wine dealers who testified that sake tasted like rotten sherry or like sherry that had gone wrong. Apparently it will go so far as to contend that when Congress provided for wines and re-enacted the similitude section it intended that section to bring under the clause of wines by virtue of the similitude clause, a beverage made from rice by a brewing process, because it resembled a "rotten" sherry which had never been the subject of importation.

The government also contends that sake resembles wine in quality because of its alcholic strength as compared with wine, sake containing somewhat less than 18% of alcohol and still wines about 16%. But we respectfully submit that it is unreasonable to suppose that Congress intended beverages, which in other respects in no wise resembled each other, to be assimilated by reason of their al-

coholic strength. There are doubtless liqueurs which are of about the same alcoholic strength as beer and wine. Can it be seriously contended that by reason of this resemblance in this respect they can be said to resemble each other in quality? There are doubtless many medicinal preparations not used as beverages at all in the proper sense of the word, which contain the same percentage of alcoholic strength as beer or wines or cordials. Can they, therefore, be said to resemble these articles in quality?

POINT IV.

The very language of the provision for still wines forbids any inference that sake could be classified as such by similitude.

The provision of Paragraph 296 is for still wines, *including ginger wine or ginger cordial and vermouth, etc.* The word "including" here used indicates a recognition by Congress that such an article as so-called ginger wine or vermouth would not be covered by the term "still wines" without specific provision therefor and that Congress did not intend to leave these articles to be brought under the still wine paragraph by similitude. Vermouth and ginger wine certainly resemble still wines to a much greater degree than does sake, and had they not been included in paragraph 296 by *enumeration* could, with much greater plausibility, have been claimed to be brought within the scope of the paragraph by similitude.

POINT V.

Sake is not dutiable as a spirituous beverage under paragraph 292.

We do not know whether this proposition will be

contended for in this court, but it was contended for in the court below (see fourth assignment of error, p. 10, fol. 16). In respect to such contention, if made, we respectfully submit:

First: That the words "spirituous beverages" as used in Paragraph 292, taken in connection with the articles enumerated before these words, and the following words "or bitters of all kinds" show that the term "spirituous beverages" in that paragraph was intended to be restricted to articles *ejusdem generis* with the articles therein enumerated.

Second: That the proviso in Paragraph 296, namely,

> "Provided that any *wines, ginger cordial or vermouth* imported containing more than *twenty-four* per centum of alcohol shall be classed as *spirits* and pay duty accordingly,"

forbids by implication the exaction of the duty provided for spirits on articles containing less than 24 per cent. of alcohol. The duty provided on spirituous beverages in Paragraph 292 is the same as that provided for spirits in Paragraph 289, namely, $2.25 per proof gallon.

POINT VI.

There is no force in the suggestion that the decision of the board of General Appraisers in the Woozens case (G. A. 2786) establishes any rule of construction for the Tariff Act of 1897.

The Court of Appeals says in its decision (p. 135, fol. 251):

> "The conclusion that there is a similarity between sake and still wine in the material of which they are compounded is somewhat

> strengthened by the facts, before referred to, that in 1894 a claim was made by an importer of sake that it should be classed for duty as a still wine, by similitude; the decision of the General Board of Appraisers upholding that contention, and the long acquiescence upon the part of the importers in this classification. These facts tend strongly to show that in the opinion of merchants interested in the question the classification thus fixed was correct; and in a case like that before us, in which there is a conflict in the evidence, the facts referred to are entitled to great weight."

The point as to the acquiescence of importers in its decision of 1894 is fully dealt with in the brief of my colleague, Mr. Fitch. I wish to point out here that under the decision of this court departmental practice as a principal of construction for the interpretation of statutes can be invoked only when that practice has been long continued.

> Merritt v. Cameron, 137 U. S. 542 at p. 549.
>
> U. S. v. Johnson, 173 U. S., 363 at p. 377.

And a decision to be regarded as an authority must have been made in a case in which the very point in controversy was argued and decided. This court has itself decided that where a decision has been made upon a point not argued and in controversy it would not regard even its own decision as a controlling precedent.

> Cross v. Burke, 146 U. S. 82 at p. 87.

In the Woozens case, the Board of Appraisers decided in 1894 that sake was not a spirituous beverage, and that it was dutiable as a still wine (which was the only claim made by the importer), but did

not have before it the question whether the article was dutiable as a non-enumerated manufactured article, or dutiable as beer by similitude. There is nothing to show that its decision was brought to the attention of Congress or considered by it and it is stretching the doctrine of departmental construction further than any court has yet gone, to claim that this decision of the Board of General Appraisers in 1894 precludes the courts of the United States from considering and deciding the question of the classification of sake under an act passed three years later.

POINT VII.

The practice of the government as to sake manufactured in the United States is totally inconsistent with its claim in the present case.

By reference to the first paragraph on page 12 of the record, it will be noted that by stipulation the following facts were admitted.

> "There are manufactories of sake in California which are sometimes called sake breweries and they are required to pay the same tax as manufacturers of malt liquors, $50.00 per year and $1.00 per barrel on their product, being the same as the internal revenue tax on beer, ales and porter. They receive the same license from the Internal Revenue Department as beer brewers."

In other words, for purposes of internal revenue taxation, the government treats sake as beer. For purposes of duty on importations it treats sake as a still wine, because the duty on still wine is higher than the duty on beer. The article certainly

cannot be both, and we submit that this attitude on the part of the government enforces our contention and the decision of the Circuit Court of Appeals for the Second Circuit, that the article is not sufficiently like either wine or beer to be dutiable, by similitude, as either.

POINT VIII.

The doctrine of commercial designation has no bearing on this case, and, if it had, the overwhelming weight of evidence in regard to it is against the government.

Neither the similitude law nor the provision for non-enumerated articles uses terms which are the subject of commercial designation. The government has sought to inject this doctrine into the case by calling as a witness the appraiser at San Francisco (p. 76) and having him produce a bottle contained in a wrapper which describes an article called Nichibei wine. This witness further testified that rice wine was a common term; that it was sometimes on the invoice as well as on the label on the bottle and continued, "but as a general thing it is called Japanese sake; that is the term used more frequently than any other term." Invoices made out in Japan do not establish a commercial designation in the United States, nor can such a designation be made out by labels on bottles. Not a single commercial witness was called by the government to testify that sake was known among merchants and dealers in this country as a wine. On the contrary, a very large number of witnesses were called by the importer, merchants and dealers in this country who swore that they had never heard it referred to as wine and that it was not so commercially known.

It cannot be seriously contended that as against the testimony of merchants and large dealers the testimony of this one witness could establish a commercial designation supporting the government's contention in this case.

POINT IX.

The practice pursued in this case of relitigating in one circuit a question which has been decided by the Court of Appeals in another circuit is one not to be encouraged.

If the record in the Nishimiya case was defective, and it was thought desirable to make a fuller record, this could have been done as soon as the decision of the Board of Appraisers had been made and the case had been brought to the attention of the law officers of the government. An examination of the two records will plainly show that one differs from the other only in point of cumulativeness. When the government, treating the record in the Nishimiya case as sufficient went on through the Court of Appeals with adverse decisions both in the Circuit Court and the Circuit Court of Appeals, proper and orderly procedure required that it should either stop there or that it should then apply to this court for a writ of certiorari. And even if later consideration brought them to the conclusion that they wanted a new case and a new record there was no reason why they should change their forum. It is of the utmost importance that questions arising as to the construction of the revenue laws should be speedily settled. The practice pursued by the government in this case has delayed the settlement of the question here involved for seven years and until after the enactment of a new Tar-

iff. Judicial encouragement of this practice will lead to the repetition of it.

POINT X.

The decision of the Circuit Court of Appeals for the Ninth Circuit should be reversed and that of the Circuit Court for the Northern District of California affirmed.

Dated, Washington, November 10, 1909.

W. WICKHAM SMITH,
Counsel.

In the Supreme Court of the United States.

OCTOBER TERM, 1909.

KOMADA & COMPANY, PETITIONER,
v.
THE UNITED STATES OF AMERICA. } No. 220.

ON CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF FOR THE UNITED STATES.

I.

STATEMENT.

The subject involved is the classification for tariff purposes of sake, a Japanese beverage containing 18 per cent of alcohol, with an invoice value of about 50 cents per gallon (R. 11).

The collector held it similar in material, quality, texture, or the use to which it may be applied to still wine "containing more than fourteen per centum of absolute alcohol," and dutiable accordingly at 50 cents per gallon under section 7 and paragraph 296, tariff act of 1897.

The petitioner protested and claims sake is either a nonenumerated manufactured article, dutiable at

20 per cent ad valorem under section 6, or by reason of similitude to ale, porter, or beer, at 20 cents per gallon, under paragraph 297, tariff act of 1897.

The Government maintains the collector's action was correct; but if not, that the liquor should be classified by similitude to ale, porter, or beer, and assessed at 20 cents per gallon, under paragraph 297.

II.

PERTINENT STATUTES.

Tariff Act 1897 (30 Stat., 174, 205)—

> Par. 296. Still wines, including ginger wine or ginger cordial and vermuth, in casks or packages other than bottles or jugs, if containing fourteen per centum or less of absolute alcohol, forty cents per gallon; if containing more than fourteen per centum of absolute alcohol, fifty cents per gallon. In bottles or jugs, per case of one dozen bottles or jugs, containing each not more than one quart and more than one pint, or twenty-four bottles or jugs containing each not more than one pint, one dollar and sixty cents per case; and any excess beyond these quantities found in such bottles or jugs shall be subject to a duty of five cents per pint or fractional part thereof, but no separate or additional duty shall be assessed on the bottles or jugs: *Provided*, That any wines, ginger cordial, or vermuth imported containing more than twenty-four per centum of alcohol shall be classed as spirits and pay duty accordingly: * * *

Par. 297. Ale, porter, and beer, in bottles or jugs, forty cents per gallon, but no separate or additional duty shall be assessed on the bottles or jugs; otherwise than in bottles or jugs, twenty cents per gallon.

SEC. 6. That there shall be levied, collected, and paid on the importation of all raw or unmanufactured articles not enumerated or provided for in this act, a duty of ten per centum ad valorem, and on all articles manufactured, in whole or in part, not provided for in this act, a duty of twenty per centum ad valorem.

SEC. 7. That each and every imported article, not enumerated in this act, which is similar, either in material, quality, texture, or the use to which it may be applied, to any article enumerated in this act as chargeable with duty, shall pay the same rate of duty which is levied on the enumerated article which it most resembles in any of the particulars before mentioned; and if any nonenumerated article equally resembles two or more enumerated articles on which different rates of duty are chargeable, there shall be levied on such nonenumerated article the same rate of duty as is chargeable on the article which it resembles paying the highest rate of duty; and on articles not enumerated, manufactured of two or more materials, the duty shall be assessed at the highest rate at which the same would be chargeable if composed wholly of the component material thereof of chief value; and the words "component material of chief value," wherever used in this act, shall be held

to mean that component material which shall exceed in value any other single component material of the article; and the value of each component material shall be determined by the ascertained value of such material in its condition as found in the article. If two or more rates of duty shall be applicable to any imported article, it shall pay duty at the highest of such rates.

Certain paragraphs relating to commodities containing alcohol, and the whole of "Schedule H—Spirits, wines, and other beverages," tariff act of 1897, are set out *post*, Appendix 1.

Revised Statutes of the United States, Concerning Internal Revenue—

SEC. 3244. Brewers shall pay one hundred dollars. Every person who manufactures fermented liquors of any name or description for sale, from malt, wholly or in part, or from any substitute therefor, shall be deemed a brewer: *Provided*, That any person who manufactures less than five hundred barrels a year shall pay the sum of fifty dollars.

SEC. 3335. Every brewer shall, before commencing or continuing business, file with the collector, or proper deputy collector, of the district in which he designs to carry it on a notice in writing, stating the name of the person, company, corporation, or firm, the names of the members of any such company or firm, the places of residence of such persons, a description of the premises on which the brewery

is situated, and of his or their title thereto, and the name of the owner thereof.

SEC. 3336. Every brewer, on filing notice aforesaid of his intention to commence or continue business, shall execute a bond to the United States, to be approved by the collector of the district, in a sum equal to three times the amount of the tax which, in the opinion of the collector, said brewer will be liable to pay during any one month, and conditioned that he shall pay, or cause to be paid, as herein provided, the tax required by law on all beer, lager beer, ale, porter, and other fermented liquors made by or for him, before the same is sold or removed for consumption or sale, except as hereinafter provided; and that he shall keep, or cause to be kept, a book, in the manner and for the purposes hereinafter specified, which shall be open to inspection by the proper officers, as by law required; and that he shall in all respects faithfully comply, without fraud or evasion, with all requirements of law relating to the manufacture and sale of any malt liquors aforesaid. * * *

SEC. 3339. There shall be paid on all beer, lager beer, ale, porter, and other similar fermented liquors, brewed or manufactured and sold, or removed for consumption or sale, within the United States, by whatever name such liquors may be called, a tax of one dollar for every barrel containing not more than thirty-one gallons; and at a like rate for any other quantity or for any fractional part of a barrel. * * *

III.

HISTORY OF SAKE IN CONNECTION WITH THE TARIFF LAWS.

Sake is the national beverage of the Japanese and is consumed principally by them. For many years considerable quantities have been imported directly from Japan into the Hawaii Islands; some has come to other domestic ports.

Since 1902 protests have been constantly entered against the classification and exactions insisted upon by the Government; the claims now amount to a very large sum—perhaps $1,000,000.

Prior to 1894 sake was classified by similitude to "distilled liquor" and subjected to a duty of $2.50 per proof gallon under paragraph 329, act 1890, and $2 under paragraph 11, act 1883. (R. 11.)

In July, 1894, Y. Woozens protested against the classification theretofore adopted claiming the liquor was dutiable under the act of 1890 by similitude to still wine. He was sustained by the Board of General Appraisers in opinion dated October 4, 1894 (T. D. 15392, G. A. 2786, R., 11), Appendix 3, hereto. The Treasury Department acquiesced and has acted accordingly until the present time; no protest against the practice was entered until March, 1902.

Three years after the Treasury Department began classifying sake by similitude to wine, and, of course, with full knowledge of the executive action, Congress passed the tariff act of 1897 which in no way modi-

fied pertinent provisions of the earlier statutes upon which the appraisers had based their ruling.

In the tariff act of 1909 sake is enumerated with still wine in paragraph 307, which provides—

> Still wines, including ginger wine or ginger cordial, vermouth, and rice wine or sake, and similar beverages not specially provided for in this section, * * * if containing more than fourteen per centum of absolute alcohol, sixty cents per gallon.

In March, 1902, Hackfeld & Co., Honolulu, protested against the classification of sake by similitude to still wine, claiming it was dutiable either under paragraph 297, act of 1897, by similitude to ale, porter, or beer, at 20 cents per gallon, or as a nonenumerated manufactured article, at 20 cents ad valorem under section 6. This was overruled by the appraisers in opinion dated April 29, 1903, and no appeal was taken (R., 12–13.). The opinion distinctly repudiates the contention that sake is a nonenumerated manufactured article, or similar to beer, and declares—

> We think this commodity should be held to be so far similar to still wine as to be classed as wine by similitude. It is similar in amount of alcohol and other constituent elements; also in color, general appearance, and somewhat in taste. It is not effervescent like beer, resembling in this respect also *still* wine.

In April, 1903, W. Nishimiya imported a small amount of sake at New York and protested against classification by similitude to wine. On appeal the

Board of Appraisers, adhering to the conclusion in the *Hackfeld case*, sustained the collector in opinion dated November 14, 1903 (R. 14–15). Nishimiya appealed to the Circuit Court for the Southern District of New York. Circuit Judge Townsend thought sake in some respects similar to both wine and beer but not sufficiently like either to warrant classification by similitude and held it was a nonenumerated manufactured article (R. 15). The Circuit Court of Appeals for the Second Circuit in an opinion by Coxe, judge (R. 16), affirmed the Circuit Court, but criticised the record as "very meager as to the points of similarity between it [sake] and the other beverages with which it is compared; many of the characteristics of wine and beer being untouched by the proof" (R. 17). Among other things he said—

> (17–18) We find sake to be similar to beer in material and the use to which it is applied and similar to still wines in quality and use. A comparison in "texture" would seem to be inapplicable to liquids.
>
> Sake resembles beer in its process of manufacture and in the presence of maltose in the extract, which is a characteristic of beer, but is never found in still wines. It resembles still wines in the large percentage of alcohol, and it has many points of similarity to both wines and beer. It is also true that in many particulars it is wholly unlike anything mentioned in Schedule H of the tariff act.
>
> The similarity to still wines, based upon the large amount of alcohol found in the imported

> merchandise, presents the strongest reason in justification of the collector's classification. In other respects we incline to the opinion that the importer presents the stronger argument. Taking everything into consideration, there are certainly as many points of resemblance between sake and beer as between sake and still wines. If there were no alternative but to select one or the other of these similitudes, it is probable that the decision would be in favor of the appellee under the rule that resolves a doubtful question of tariff interpretation in favor of the importer. But sake has so many characteristics which are not found in either beer or wine, its ingredients are so unusual, and the process of its manufacture so unique, that it may be fairly held that it is nowhere described, except by the general language of section 6.

Notwithstanding such distinct finding of similarity, the court adjudged the classification by reason of similitude to still wine was error!

All the evidence and the opinions in the Nishimiya and Hackfeld cases are in the present record at pages 12–25. The meagerness of the proof is apparent; and the inconsequence of the conclusions reached by the courts, we submit, is not difficult to see. It does not follow because sake is similar to both beer and wine that classification by similitude to the latter is erroneous or that it is an unenumerated article.

The record having been declared inadequate, the Government declined to accept the Nishimiya case as conclusive of the controversy. To secure an adju-

dication upon a complete record this case, based upon a protest at San Francisco, was made up, a large amount of evidence taken, and the points involved fully elucidated. When presented to the Board of General Appraisers they felt bound by and followed the opinion of the courts at New York in the Nishimiya case, expressing no independent judgment. They said (R. 5)—

> A new case has been made up and much additional evidence taken. This evidence, in our opinion, warrants a difference of opinion as to the dutiable status of the article and makes the case a proper one for the application of the doctrine of *stare decisis*. We should not feel warranted in holding that the present case is sufficiently differentiated from the *Nishimiya case* to authorize a departure from the rulings of the courts.

Additional proof was taken and the matter presented to the Circuit Court at San Francisco. "At the conclusion of the oral argument, the court announced that as the cause would be properly heard *de novo* upon appeal, it would follow the decision of the Circuit Court of Appeals in New York in *United States* v. *Nishimiya* (137 F. R., 396), and act *pro forma;* and without further examination of the record, affirmed the action of the Board, and announced orally the opinion reported in 148 Federal Reporter, page 125, printed hereinafter" (R. 5). This *pro forma* action, of course, deprived the judgment of the weight which otherwise might have been given it on

appeal. Nevertheless it is much relied on here by petitioner without pointing out its true character.

The Government appealed and its position was fully sustained by the Circuit Court of Appeals for the Ninth Circuit after careful examination of the whole subject.

Both the Board of Appraisers and the Circuit Court followed the *Nishimiya case*—the board felt constrained thereby, and the Circuit Court below acted *pro forma*, saying that upon appeal the cause would be heard *de novo* (R. 5). It can not, therefore, be said that the Appraisers or the Circuit Court denied the contention of the Government because of deliberate opinion against it.

The only tribunal which has expressed an independent judgment on the facts here presented is the Circuit Court of Appeals for the Ninth Circuit, and it distinctly found in favor of the Collector's action after consideration of the entire record, including samples of the various liquids.

It appears therefore—

That in 1894 the Board of General Appraisers found sake similar to still wine and that it should be classified accordingly.

That the Treasury Department accepted the classification directed by the board and has followed the same down to date.

That with full knowledge of the ruling of the board and the continued practice of the Treasury Department the tariff act of 1897 was passed without

modification of the pertinent provisions of former acts.

That in April, 1903, the Board of General Appraisers in the *Hackfeld case* again determined that sake is similar to still wine and should be so classified.

That in November, 1903, in the *Nishimiya case* the Board of Appraisers for the third time determined sake is similar to still wine and should be so classified.

That upon a record criticised as entirely inadequate the Circuit Court and the Circuit Court of Appeals at New York, while finding sake in some respects similar to still wine, nevertheless disagreed with the opinion reached by the Board of Appraisers and reversed its action.

That the imports under consideration were brought in long after the classification by similitude to still wine was established and, of course, in view of the settled practice.

That a new case was made up wherein the Board of Appraisers felt constrained by the action of the courts in New York, and the Circuit Court acted *pro forma*, declaring the cause would be heard *de novo* on appeal.

That the Circuit Court of Appeals for the Ninth Circuit, the only tribunal which has ever undertaken to announce an independent judgment upon the present record, has in all respects sustained the Government.

The record recites (12)—

> There are manufactories of sake in California which are sometimes called sake breweries, and they are required to pay the same tax as manufacturers of malt liquors, $50 per year and $1 per barrel on their product, being the same as the internal-revenue tax on beer, ales, and porter. They receive the same license from the Internal-Revenue Department as beer brewers.

The letters written by the Commissioner of Internal Revenue relating to the taxation of sake makers are *post* (Appendix 2).

IV.

WHAT SAKE IS—ITS MANUFACTURE, COMPOSITION, USE, ETC.

Alcoholic liquors are divided into three groups: (1) Fermented liquors or wines in which the sugar of fruit is converted into alcohol by simple exposure to the air; (2) malt liquors, such as beer, ale, porter, which, being mostly made from grains and starchy materials, requiring the preliminary process of malting by which the starch is converted into sugar before alcoholic fermentation is possible; (3) distilled liquors, or ardent spirits, as brandy, whisky, gin, in which the fermented liquor, whether derived from fruits, grain, or other sugar-producing material, is treated to a further process of distillation or vaporizing and condensing. (International Enc.—Liquors.)

Wines result from the fermentation of the juices of grapes, berries, fruits, or plants containing sugar,

which is generally brought about by the natural yeast found on the fruit or in the air; but sometimes prepared yeast is introduced. The sugar is converted directly into alcohol and carbonic acid gas; certain acids also result from the fermentation which together with those naturally in the juice aid in giving flavor and character to the liquor. The alcohol varies from about 7 to 20 per cent (R. 35, 63, 93).

Beer or ale is made from some starch-bearing grain, part of which is first malted (germinated) in order to produce diastase capable of converting the starch into sugar. By proper manipulation this conversion is then brought about and hops are generally added. Thereafter fermentation is occasioned by introducing a specially prepared yeast, and by this the sugar resulting from the action of the diastase on the natural starch is converted into alcohol and carbonic acid gas. Alcohol in the finished product varies from about 2 to 8 per cent (R. 35, 85, 99).

To produce distilled liquors or spirits, the wine or beer, made in the general ways described, is subjected to distillation. The per cent of alcohol in the finished product is very large—40 or more.

There is no substantial controversy as to material used and methods followed in manufacturing sake. Jokichi Takamine, witness for the importers, a graduate chemist who has given special attention to the subject, testified (R. 35)—

> Sake is made from rice. The rice is first husked, then the brown coating or bran is

removed by suitable means. This is thoroughly washed with water, then steamed for the purpose of gelatinizing the starch; a portion of that rice is taken, cooled to a body temperature; a small quantity of spores of fungus called moyashi is added and thoroughly mixed. Then the mass is put into a growing room. After a certain number of hours the mass is spread on wooden trays and allowed to remain there at the proper temperature and humidity for a period ranging from thirty to fifty hours. At the end of that time the steamed rice would present a white velvety appearance. Then the substance is taken out of the growing room. The substance thus obtained is called "koji," and it will be found that it has acquired considerable diastatic power; that is to say, the mass will now have the power of converting starchy material into sugar. This substance, koji, corresponds to that of malt in beer brewing. A portion of that koji is now mixed with a fresh portion of steamed rice, with the proper quantity of water, and allowed to stand, with the proper manipulation, for a period of about two days. During that time the mass will acquire a sweetish taste and eventually acquire an alcoholic taste. The mass thus obtained is called moto or shubu. This mass will be found to contain a very active yeast ferment in abundant quantity, and the mass corresponds to the batch of yeast in beer brewing. Into this moto a fresh quantity of steamed rice and koji is added and allowed to ferment. After a certain period another fresh portion of

steamed rice and koji is added until a fourth portion of the steamed rice and koji is added. The whole thing is allowed to ferment out. Then the mass is filtered, pressed through a linen bag, and the filtered liquid is allowed to settle. The clear portion thus obtained is sake, the popular Japanese alcoholic beverage. When freshly finished it naturally contains some quantity of carbonic acid gas. Before being put into a cask or bottle, sake is usually subjected to a temperature of about 140° F., a process somewhat similar to pasteurizing in beer, and during this process all the carbonic acid gas contained therein will escape to the air, producing a noneffervescent liquor.

In a brewing process malt is the converting agent; that is, it is used for converting starchy material of the grain into sugar, from which alcoholic beverage is fermented by yeast. I have just described the process of making koji, which corresponds to malting process in the European and American way of making beer. Thus I can say that the koji process is a particular malting process used in sake brewing. The diastase in beer brewing results from the germination of the grain used, usually barley. Diastase in sake brewing is produced by the growth or the germination of this particular fungus that has been added to rice in the early part of the process.

The object of yeast in any brewing process is to convert the sugar into alcohol. The yeast in brewing beer is artificially added.

In the manufacture of wines, the sugar already exists in the fruit, and therefore no

> diastase or diastatic action is required in order to obtain the alcohol. A diastatic action is a necessity in the fermentation of a grain. When one wants to produce alcohol from starch, it must be changed first into sugar, and in order to change into sugar the diastase is universally used for the purpose. The process of making sake may be termed brewing in the sense that beer is made.

The sake process differs in detail from those followed for wine and beer; but all produce beverages with alcoholic contents resulting from fermentation—the conversion of sugar; and the amount of such alcohol in sake is much nearer to that contained in wine than in beer.

It is admitted that "the sake, subject of this protest, contains 18 per cent alcohol" (R., 11). It is still; that is, contains no carbon dioxide.

The tables following give analyses of sake, sherry, and ale by importers' witness, Takamine (R., 35); and of sake, sherry, wine, ale, and beer by Wyatt (R., 85), and Bigelow (R., 93), witnesses for Government. The figures express percentums; the amount of water is not specified.

Analyses of Sake, Sherry, and Ale by Takamine, witness for importers (R. 35)—

SAKE.	Per cent.
Specific gravity	0.9928
Alcohol by volume	16.42
Extractive matters	3.49
Ashes	.09

	Per cent.
Volatile acid (estimated as acetic)	0.04
Fixed acid (calculated as lactic)	0.27
Glycerine	1.35
Maltose	1.90
Dextrine	.72
Sulphuric acid	Trace.
Nitrogenous matter	.89
Dextrose	None.
Tartaric acid	None.
Water.	

DUFF GORDON SHERRY.

Specific gravity	0.9868
Alcohol by volume	20.06
Extractive matter	1.67
Ashes	0.49
Volatile acid (calculated as acetic)	0.07
Fixed acid (calculated as tartaric)	0.45
Glycerine	0.62
Dextrose	0.11
Sulphuric acid	0.24
Nitrogenous matter	0.10
Maltose	None.
Dextrine	None.
Water.	

PEACOCK ALE.

Specific gravity	1.0187
Alcohol by volume	9.95
Extractive matter	9.83
Ashes	0.51
Volatile acid (calculated as acetic)	0.05
Fixed acid (calculated as lactic)	0.44
Glycerine	0.24
Maltose	3.39
Dextrine	3.31
Sulphuric acid	0.10
Nitrogenous matter	0.49
Dextrose	None.
Water.	

The following analyses of Sake, Wine, Beer, and Ale are by Wyatt, government witness (R., 84, 85)—

SAKE.

	Per cent.
Absolute alcohol by distillation (by volume)	17.05
Residual unfermented extract	3.60
Total acidity (estimated as lactic)	0.39
Residual sugars unfermented (estimated as maltose)	1.929
Ash	0.058
Albuminoids	0.018
Glycerine	1.14
Water.	

AVERAGE ANALYSIS OF WINES.

Alcohol by volume (per cent)	11.17
Volatile acidity	.03
Total acidity (estimated as tartaric)	.3
Total extractive bodies or unfermented solids	3.10
Unfermented sugar as dextrose	.35
Glycerin	.48
Ash	.12
Nitrogenous bodies	.14
Water.	

AVERAGE ANALYSIS OF BEER.

	Draught.	Bottling.
Alcohol by volume (per cent)	4.6	5.25
Volatile acidity	.007	.010
Unfermented residual solids (known as extract)	5.80	5.50
Fixed acidity (calculated as lactic)	.14	.15
Unfermented sugar left in extract	1.50	1.40
Nitrogenous bodies	.50	.45
Ash	.20	.20
Water.		

AVERAGE ANALYSES OF ALES.

	American.	Imported.
Alcohol by volume (per cent)	6.00	8.10
Volatile acidity	0.012	0.020
Unfermented extract or solids	5.50	4.40
Fixed acidity (estimated as lactic acid)	0.18	0.22
Unfermented residual sugars in extract (estimated as maltose)	1.70	0.95
Nitrogenous bodies	0.65	0.55
Ash	0.22	0.36
Water.		

Analyses of Sherry Wines and Ales by Bigelow, government witness (R., 93)—

DUFF GORDON SHERRY.

	Per cent.
Specific gravity	0.98706
Alcohol by weight	14.84
Alcohol by volume	18.45
Glycerine	0.402
Extract	1.91
Total ash	0.50
Alkalined and ash extract, expressed in cubic centimeters	0.10
Acid per 100 grams	12.16
Phosphoric acid (express as P_2O_5)	0.015
Total acids	0.43
Volatile acids	0.03
Water.	

"JIMINEZ & LAMOTHE" SHERRY.

Specific gravity	0.98777
Alcohol by weight	15.32
Alcohol by volume	19.08
Glycerine	0.610
Extract	2.32
Total ash	0.48
Alkaline	14.58
Phosphoric acid	0.016
Total acidity	0.40
Volatile	0.05
Water.	

ALES.

	Bottling.	Draught.
Specific gravity	1.01308	1.01408
Alcohol by weight	5.22	4.91
Alcohol by volume	6.65	6.28
Glycerine	0.192	0.176
Extract	5.47	5.78
Total ash	0.35	0.33
Alkalined	27.87	25.64
Phosphoric acid	0.061	0.057
Total acid	0.24	0.15
Volatile acid	0.04	0.01
Water.		

The item "alkaline" in above analyses by Bigelow is not specified in those by other witnesses, and there is no explanation of its composition.

"The use to which it [sake] may be applied" is the ordinary one of a beverage containing a like amount of alcohol—especially, to produce stimulation, exhilaration, intoxication, to aid digestion, etc. It is taken with meals in about the same quantities as sherry wine. The Japanese commonly prefer it warm, but they sometimes take it cold, and other nationalities seem to prefer the latter way (R. 36). Japanese now drink sake where others might use sherry; and the former may now, or at any future time, be drunk by others in this country as a substitute for the latter. The statute only requires similarity in "the use to which it *may be* applied," not *is* or *has been* applied. The duty must be assessed against the first importation and before it becomes possible to tell who will actually drink the beverage.

V.

THE JUDGMENT OF THE CIRCUIT COURT OF APPEALS AT SAN FRANCISCO SHOULD BE AFFIRMED, EVEN THOUGH THIS COURT SHOULD THINK THE WEIGHT OF EVIDENCE AGAINST THE CONCLUSION THERE REACHED ON THE QUESTION OF FACT INVOLVED.

The action of the collector is presumptively correct. The burden is upon the protesting importers to establish their contention.

> *Arthur* v. *Unkart* (96 U. S., 118).
> *Earnshaw* v. *Cadwalader* (145 U. S., 247, 262).
> *Erhardt* v. *Schroeder* (155 U. S., 124).
> *United States* v. *Ranlett* (172 U. S., 133, 146).

The collector held the import similar to still wine; and similarity is a question of fact. (*Herrman* v. *Miller*, 127 U. S., 363, 370.) The Board of Appraisers and the Circuit Court in the present controversy merely followed the opinions of the courts in New York; their action, therefore, is not entitled to the weight which ordinarily might be given it.

The Circuit Court of Appeals, the only tribunal which has rendered an independent judgment on the record here under consideration, sustained the collector.

It follows that petitioners are asking this court to reverse the action of a court below based upon a finding of fact; that the Government may rely on the presumption in favor of the collector's action; and also upon the well-established rule prohibiting a reversal of a judgment based upon such finding unless there is no evidence to sustain it.

The opinions and judgments of the New York courts were on an entirely different and imperfect record and should be accorded little, if any, weight.

The Board of Appraisers—experts—with samples before it has three times declared in favor of the Government's contention and has supported its conclusion by persuasive opinions (R. 12, 14, and Appendix 3). The conclusion has been approved by the only court which, after examination, gave independent consideration to and judgment upon this record and a well-reasoned opinion supports the result (R. 132).

The Government, therefore, invokes the rule that a finding by the Board of Appraisers, affirmed by the court upon consideration of the evidence, will not be disturbed unless wholly unwarranted. The utmost that importers can fairly claim is a conflict in the testimony.

It is true the present record shows the Board of Appraisers decided against the Government, but it also shows this was because they felt constrained by the opinions of the courts in New York and not because in agreement with them upon the question of fact involved. The conclusion was not the "independent judgment" of the board. The Circuit Court below likewise decided against the Government, but this was *pro forma* (R. 5).

The courts in New York are the only tribunals whose deliberate opinions have been against the Government; and we submit their reasoning is not per-

suasive, and that they are not entitled to weight in this controversy. All the evidence of witnesses presented to those courts and their opinions are in the record at pages 12–25, and an examination will show the force of the criticism by the Circuit Court of Appeals that "the record is very meager as to the points of similarity between it [sake] and the other beverages with which it is compared; many of the characteristics of wine and beer being untouched by the proof" (R. 17).

In the Circuit Court at New York, Townsend, C. J., in a brief opinion (R. 15) concluded that while sake is similar in some respects to both wine and beer it is radically different from both and should be classed as a nonenumerated article. This opinion, rendered probably when not even counsel for the Government were informed concerning the grave importance of the controversy, rather summarily disposes of the question involved, and is not persuasive.

In the Circuit Court of Appeals, the opinion was by Coxe, J. (R. 16). He found that sake "has many points of similarity to both wine and beer," but "has so many characteristics which are not found in either beer or wine, its ingredients are so unusual and the process of its manufacture so unique, that it may be fairly held that it is nowhere described, except by the general language of section 6" (R. 18).

Section 7 of the tariff act requires classification according to similarity in material, quality, texture, or use; and, manifestly, substantial similarity in any one of such particulars is sufficient notwithstanding

dissimilarity may exist in all others. The same section further provides "if any nonenumerated article equally resembles two or more enumerated articles on which different rates of duty are chargeable, there shall be levied on such nonenumerated articles the same rate of duty that is chargeable on the article which it resembles paying the highest rate of duty." The intention of Congress was to exact the largest amount in cases of uncertainty. This conclusion is confirmed by the further provision in the same section that "if two or more rates of duty shall be applicable to any imported article it shall pay duty at the highest of such rates."

The settled interpretation and practice of the executive officers since 1894 has been to classify sake by similitude to still wine. This was not challenged until 1902; and with full knowledge of it the tariff act of 1897 was passed. Since 1894 sake has been imported in view of the practice, and, of course, it has been sold by importers with the duty added. Accordingly no unexpected hardship has been imposed upon petitioner; nobody has been misled; and in a broad sense what importers now ask is wholly inequitable.

United States v. *Cerecedo Hermanos y Compañía*
209 U. S., 337–339.

This was an appeal by the United States from the District Court of Porto Rico. The case grew out of an importation into that island from France of 30 cases of red wine, 24 bottles to the case, each of which

contained more than 1 pint and less than 1 quart. It was classified under paragraph 296, act 1897, and treaty with France, May 30, 1908, as dutiable at $1.25 per dozen bottles. The importers protested, claiming that it should have been assessed by cases of 24/2; the protest was sustained by the Board, and its action affirmed by the District Court. Through Mr. Justice McKenna this court said—

> The only question in the case is the construction of paragraph 296, the material portions of which are as follows:
>
> "In bottles or jugs, per case of one dozen bottles or jugs, containing each not more than one quart or less than one pint, or twenty-four bottles or jugs, containing each not more than one pint, $1.60 per case; and any excess beyond these quantities found in such bottles or jugs shall be subjected to a duty of 5 cents per pint or fractional part thereof * * *."
>
> It is the contention of the Government that the paragraph separates still wines in bottles into three classes and fixes a specific rate of duty on each, as follows:
>
> "(*a*) Bottles 'containing each not more than one pint,' or which are to be assessed as full pints at $1.60 per 24 bottles, or at the rate of $6\frac{2}{3}$ cents per pint; (*b*) bottles 'containing each not more than one quart and more than one pint' which are to be assessed as full quarts at $1.60 per dozen bottles; that is, at the same rate of $6\frac{2}{3}$ cents per pint; and (*c*) bottles containing 'any excess beyond these quantities,' which are to be assessed at the rate of $1.60 per dozen, plus 5 cents per pint or

fractional pint on the excess over a quart contained in each bottle."

We think the contention is right, and needs no comment to make it clear.

Counsel for the government also points out that the provisions of the tariff act of 1875 and subsequent acts were substantially similar to paragraph 296 and that the Treasury decisions thereunder were in accordance with the interpretation for which the government now contends. The first of these decisions was made in 1879. *In Re De Luze*, T. D. 4060. The ruling was repeated in 1893. *In Re G. W. Sheldon & Company*, T. D. 14461. And again in 1899. *In Re Weyman*, T. D. 20843.

We have said that, when the meaning of a statute is doubtful, great weight should be given to the construction placed upon it by the department charged with its execution. (*Robertson* v. *Downing*, 127 U. S. 607; *United States* v. *Healey*, 160 U. S. 136.) And we have decided that the reenactment by Congress, without change, of a statute which had previously received long-continued executive construction is an adoption by Congress of such construction. *United States* v. *Falk*, 204 U. S. 143, 152.

[Mr. Justice White and Mr. Justice Peckham concurred solely because of the prior administrative construction.]

See also *Robertson* v. *Downing* (127 U. S., 607); *United States* v. *Healey* (160 U. S., 136); *United States* v. *G. Falk & Bro.* (204 U. S., 143); *Hill Brothers Co.* v. *United States* (151 Fed., 476); *Charles Morningstar & Co.* v. *United States* (159 Fed., 287).

VI.

IF THE CONTROLLING QUESTION BE TREATED AS AN ORIGINAL ONE OF FACT FOR DETERMINATION BY THIS COURT, THE COLLECTOR'S CLASSIFICATION SHOULD BE UPHELD.

There is no controversy as to the process in manufacturing sake. It is described by witnesses at record, 18, 19, 34, *et seq.* Rice is the grain used; the diastatic substance for converting the starch into sugar is technically known as koji, and is produced by the addition of certain spores to steamed rice followed by proper manipulation.

"In a brewing process malt is the converting agent; that is, it is used for converting starchy material of the grain into sugar from which alcoholic beverage is fermented by yeast. I have just described the process of making koji, which corresponds to malting process in the European and American ways of making beer. Thus, I can say that the koji process is the particular malting process used in sake brewing. The diastase in beer brewing results from germination of the grain used, usually barley. Diastase in sake brewing is produced by the growth or the germination of this particular fungus that has been added to rice in the early part of the process.

"The object of yeast in any brewing process is to convert the sugar into alcohol; the yeast in brewing beer is artificially added.

"In the manufacture of wines the sugar already exists in the fruit and therefore no diastase or dias-

tatic action is required in order to obtain the alcohol. A diastatic action is a necessity in the fermentation of a grain. When one wants to produce alcohol from starch, it must be changed first into sugar, and in order to change into sugar the diastase is universally used for the purpose. The process of making sake may be termed brewing in the sense that beer is made" (R. 36).

The similitude clause set out *ante*—p. 3—has long been a part of tariff legislation—in substance it was in the act of 1842 and in all subsequent ones. Its purpose is to subject like articles to the same taxation. In *Stuart* v. *Maxwell* (16 How., 150, 160) concerning it this court, by Mr. Justice Curtis, said—

> It was designed to afford rules to guide those employed in the collection of the revenue, in certain cases likely to occur, not within the letter, but within the real intent and meaning of the laws imposing duties, and thus to prevent evasions of those laws. Manufacturing ingenuity and skill have become very great; and diversities may be expected to be made in fabrics adapted to the same rules, and designed to take the same places as those specifically described by some distinctive marks, for the mere purpose of escaping from the duty imposed thereon. And it would probably be impossible for Congress by legislation to keep pace with the results of these efforts of interested ingenuity. To obviate, in part at least, the necessity of attempting to do so, this section was enacted.

In *Arthur* v. *Fox* (108 U. S., 125, 128), Mr. Chief Justice Waite for this court said—

> The goods in question are "nonenumerated." But they are substantially like a manufacture of goats' hair and cotton, which is enumerated. They are put to the same uses, look the same, and frequently, in commerce, are called by the same name. They are made of cotton and cow hair, and are evidently of equal quality with the manufactures of cotton and goats' hair, because, in this case, they are charged with a duty of 50 cents per pound, thus indicating a value of 80 cents a pound or over, which calls for the highest duty per pound put on the goats' hair goods. It would seem to be difficult to find a closer resemblance between two articles of manufacture which were not identically the same. * * *
>
> If an article is found not enumerated in the tariff laws, then the first inquiry is whether it "bears a similitude, either in material, quality, texture, or use to which it may be applied, to any article enumerated * * * as chargeable with duty." If it does, and the similitude is substantial, then, in the language of the court in *Stuart* v. *Maxwell* (*supra*), "it is to be deemed the same, and to be charged accordingly." In other words, although not specifically enumerated, it is provided for under the name of the article it most resembles.

Sake is not a product from grape or fruit juice and therefore not a true wine; but the Government main-

tains it is substantially similar (not identical) to wine in material, quality, and the use to which it may be applied.

Schedule H, tariff act of 1897, and paragraphs 2, 67, 70, and 263 (Appendix 1), indicate the fixed purpose of Congress to tax imports with special reference to alcoholic contents; and the whole act must be applied in view of this.

Similarity is the question of fact (*Herrman* v. *Arthur*, 127 U. S., 363, 370); it must be substantially in one (but only one) of the particulars enumerated—material, quality, texture, or possible use.

In *United States* v. *Roessler & Hasslecher Chemical Company* (137 Fed., 770, 773), the court said—

> The counsel for appellant have taken pains to point out numerous instances wherein the two articles differ, but it must be borne in mind that the statute does not require identity; if that were necessary the statute would have no *raison d'etre*. It is enough if there be a substantial similitude in *any one* of the particulars mentioned—material, quality, texture, or use. (*Arthur* v. *Fox*, 108 U. S., 125.)

See also on the subject of substantial similitude—

Greenleaf v. *Goodrich* (101 U. S., 278, 283).
Arthur v. *Fox* (108 U. S., 125).
Weilbacher et al. v. *Merritt* (37 Fed., 85).
Mandell et al. v. *Seeberger* (39 Fed., 760).
Kerry et al. v. *Magone* (40 Fed., 873).

In re Herter Brothers (53 Fed., 913).
United States v. *Dana* (99 Fed., 433).
Hahn v. *United States* (100 Fed., 635).
Tiffany v. *United States* (112 Fed., 672).
In re Guggenheim Smelting Co. (112 Fed., 517).
Waddell & Co. v. *United States* (124 Fed., 301).
Rich v. *United States* (177 Fed., 293).

Use.

The percentage of alcohol in sherry and in sake is approximately the same (R., 35, 93), and similitude in the uses to which they may be applied is apparent from what has been set out *ante*, page 21. Both are beverages drunk for exhilaration and other results depending primarily on alcoholic contents. The artificial temperatures at which different palates prefer the liquors can not affect the issue. A beverage does not lose its character by being warmed or iced.

Quality.

"Quality" as used in the similitude clause seems not to have been judicially interpreted. The word has many definitions and is employed to express a variety of ideas; its meaning in the clause must, of course, be determined from the context and evident intent of the legislature.

Some definitions from standard lexicons follow:

Webster's Unabridged—

> Quality. [Lat. *qualitas* from *qualis*, how or so constituted, such.]
>
> (1) The condition of being of such and such a sort as distinguished from others; nature, relatively considered; character; sort; rank.
>
> (3) That which makes or helps to make anything such as it is; anything belonging to a subject or predicable of it; distinguishing property, characteristic or attribute, peculiar power, capacity or virtue; distinct trait.
>
> "Foreign nations did ample justice to his great qualities." (Macaulay.)

Standard Dictionary—

> Quality, (1) That which is an element of anything or aids in making it distinct from other things; distinguishing character; strictly and etymologically that which makes a being or thing such as it is; essential property; as whiteness and coldness are qualities of snow.
>
> (2) The attributes or characteristics of anything as determining its value, place, worth, rank, position, etc., or the condition of a thing as so determined; character; kind; as used absolutely, peculiar or characteristic excellence; as a voice of mellow quality; wine of quality.
>
> (3) Degree of excellence; relative goodness; grade; as sugar of good or bad quality.
>
> (5) Capable of producing specific effects; virtue; as herbs possessing healing qualities.
>
> Synonyms—attribute; characteristic.

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Century Dictionary—

> Quality, (1) That from which anything can be said to be such or such; a character expressible by an adjective admitting degrees of comparison, but not explicitly relative nor quantitative. Thus, blueness, hardness, agility, and mirthfulness are qualities.
>
> (4) Degree of excellence or fineness; grade; as the food was of inferior quality; the finest quality of cloth.
>
> Synonyms—property, attributes, etc.

No substantial foundation can exist for petitioners' claim that "quality" in section 7 means "degree of excellence; relative goodness; grade: as sugar of good quality." (Brief, Smith of counsel, 16.) If that definition be read into the section in lieu of "quality" the result would be absurd. Because two things are similar in "degree of excellence"—both good or poor, for example—affords no reason for subjecting them to the same taxation. Should good sake be classified by similitude to good iron ore dutiable at $1 per ton (Par. 121); or by similitude to good diamonds dutiable (Par. 435) at 10 per cent ad valorem?

Two articles properly are said to be "similar in quality" when there is substantial similarity between their distinguishing or essential properties, characteristics, attributes, or the specific effects which they are capable of producing.

From the samples now before the court, the analyses and other evidence in the record, it appears that sherry wine, (especially the Jiminez & Lamothe) and

sake are both still beverages containing about equal percentages of alcohol; in color, taste, odor, general chemical composition, and the effects which they are capable of producing they are decidedly similar; and such similarity is greater than that existing between sake and any other enumerated article. This is sufficient to support the collector's classification.

Material.

That similarity in material within the statute refers to condition of imports when entered seems too plain for much discussion. Of what is the unenumerated thing composed? is the point for the collector's decision. As aids he may of course consider process of manufacture or any other illuminating thing.

Three detailed chemical analyses appear in the evidence (R. 35, 84, 85, 93). All do not follow the same plan, and nothing reveals the chemical constituents of certain specified items, e. g., "alkaline," in Bigelow's analysis (R. 93), and "extractive matters," in Takamine's (R. 35). Manifestly, also, different samples of sake and wine might yield decidedly varying results; and the record does not disclose what, if any, constituent, or the amount of the same, must be present before the liquid properly can be called sake or wine.

Louis Falkenau, chemist, and witness for the importers, says of sake: "It contains dextrines and possibly some maltose." No doubt the beverage

would still be sake if the ordinary amount of maltose were double and the dextrines reduced one-half.

Charles E. Wetmore, witness for the importers, says wine contains malic and tartaric acids (R., 26); but the detailed analyses of wine in the record, *ante* 17–21, show no malic acid.

The brief for the importers (Fitch of counsel, p. 24) says: "It stands demonstrated by five chemists who testified for the importer and by two chemists who testified for the Government, and it was not disputed by anybody, that sake contains maltose and dextrine and does not contain malic acid, tartaric acid, or dextrose, and that wine contains malic acid, tartaric acid and dextrose and does not contain maltose or dextrine." This statement, unexplained, is misleading, since malic acid does not appear as a constituent of wine in any of the three analyses in the record.

Jiminez & Lamothe and Duff Gordon sherry contain like amounts of alcohol (18 to 19 per cent) and have substantially the same chemical contents (R. 93). In order to test the theory that chemical analyses show decided dissimilarity in material between sake and sherry, it will suffice to give special consideration only to those by Takamine, witness for importers (R. 35); and what immediately follows is based on his testimony.

The major part of each is water; alcohol—18 to 20 per cent—is the next most important constituent. Of the remaining ones glycerin, sulphuric acid, nitrogenous matters, and extractive matters (nature and

composition of the latter not explained) appear in both.

Sake contains maltose, 1.90 per cent, and dextrine, 0.72 per cent; neither of these is in wine, but dextrose, 0.11 per cent, does appear therein.

Sake contains some unnamed volatile acid, 0.04 per cent; wine, a volatile calculated as acetic acid, 0.07 per cent.

Sake contains fixed acid calculated as lactic, 0.27 per cent; wine, a fixed acid calculated as tartaric, 0.45 per cent.

Takamine found no malic acid in the sample of wine he analyzed; nor is it put down in any other detailed analysis. It is plainly a nonessential.

Are sherry and sake fundamentally different because tartaric acid and dextrose are found in the former and not in the latter, while maltose and dextrine appear in sake but not in sherry? Whether any of these substances is essential to either beverage we do not know. And if so, we do not know the requisite amount. Moreover, if the contents with the technical names relied on to support the claim of essential dissimilarity are really similar or closely related, the claim must fail.

Of course, neither executive officers when administering tariff laws nor the courts in construing them were ever expected to enter far into the deep mysteries of organic chemistry; but in order to expose the weakness of the contention that there is marked dissimilarity in material between sake and wine, we venture to refresh the court's recollection concerning cer-

tain technical terms and facts by statements taken chiefly from articles in the International Encyclopedia (ed., 1907) under the titles fermentation, sugars, alcohol, brewing, liquors, glucose, acetic acid, etc.

All of the substances in question are carbohydrates—organic substances composed of carbon, hydrogen, and oxygen.

Enzyme is a name applied to any one of a certain group of substances that occur in plants and in animals and have the power of decomposing various carbon compounds, starch, sugar, etc., when brought in contact with them. They were formerly called "unorganized ferments," to distinguish them from yeasts and bacteria (organized ferments), which produce similar changes. The distinction is of no value, for it has been shown that the action of the so-called organized ferment is usually due to enzymes secreted by them. Little is known of the chemistry of the enzymes; indeed, there is no available test of their presence except their action. Fermentation is often a very complex process, the different stages of which are characterized by the presence of substances differing in some chemical or physical aspects, but nevertheless related. Different enzymes produce different results, e. g., diastase, occurring in all plants, by acting on starch produces maltose and dextrin; invertase, which occurs in many plants, acting on saccharose, produces glucose and fructose; zymase occurring in yeast, by acting on sugars, produces alcohol and carbon dioxide.

MALT is grain which has been steeped in water, allowed to germinate or throw out sprouts during a number of days, and then dried by artificial heat. During the malting or sprouting of the grain a substance is formed known as Diastase (a species of enzyme), which has the power to change the insoluble starch of the grain into dextrine and then into maltose or malt sugar, both of which substances are soluble in water. This conversion takes place during the steeping of the mash. During the fermentation the sugars which have been formed in steeping are decomposed by the action of the yeast into alcohol and carbonic acid gas. Various minor chemical reactions occur during these processes.

ALCOHOL (ethyl) (C_2H_6O).—The alcohol of commerce in its various forms is all made by fermentation. Natural products containing a large amount of starch, such as grain, rice, potatoes, etc., are reduced with water to a paste, and a small quantity of malt is added to produce fermentation, by which the starch is in a short time transformed into dextrin and a kind of sugar called maltose, according to the following chemical equation:

$$3\ C_6H_{10}O_5\ \text{(starch)} + H_2O\ \text{(water)} =$$
$$C_6H_{10}O_5\ \text{(dextrin)} + C_{12}H_{22}O_{11}\ \text{(maltose)}.$$

Then yeast, which consists of living plant cells, is added to set up a new process of fermentation by which the maltose is converted into alcohol according to the following chemical equation:

$C_{12}H_{22}O_{11}$ (maltose) $+ H_2O =$
$4\ C_2H_6O$ (4 molecules alcohol) $+ 4\ CO_2$ (4 molecules carbon dioxide).

The flavor of alcoholic beverages is due to the presence of various organic substances often produced by modifying the process of manufacture. Thus both the flavor and color of beer depend largely on the temperature and duration of heating of the malt before using it; the flavor of Scotch whisky is derived mainly from the peat used in drying the malt, etc. The quantity of alcohol in various beverages is very different; gin, rum, and the strong liquors contain from 40 to 50 per cent; port contains from 15 to 25 per cent; sherry or madeira, from 15 to 20 per cent; champagne and burgundy, from 10 to 13 per cent; hock, from 10 to 12 per cent; claret, from 8 to 12 per cent; cider and strong ale, 5 to 9 per cent; beer or porter, from 2 to 5 per cent.

Sugar.—A term applied to a large number of related substances composed of carbon, hydrogen, and oxygen, which are more or less sweet, readily soluble in water, colorless and odorless, and usually crystallizable. They vary in sweetness, in effect on polarized light, and in power to reduce certain metallic compounds. Among the more important ones are: Sucrose, levulose, raffinose, maltose, lactose, galactose, dextro-glucose, dextro-fructose, etc.

Maltose, or maltobiose, or malt sugar, or amylon ($C_{12}H_{22}O_{11}$) (the same formula as cane sugar), is formed together with dextrine and dextrose when starch is hydrolyzed with an enzyme or acid. It is present in malted grain, in commercial glucose, and in the mash of beer and whisky. It is usually obtained in the form of crystalline crusts. When hydrolyzed it is

converted into dextro-glucose. [A sugar is hydrolyzed when each one of its molecules combines with one or more molecules of water (H_2O) and simultaneously splits up into two or more monosaccharide molecules.]

DEXTRIN (from Lat. *dexter*, referring to its power of turning to the right the plane of polarized light) is the name applied to several organic substances produced by the action of malt extract, saliva, or pancreatic juices upon starch paste, the first product of the transformation being soluble starch, and dextrin being produced by the hydrolysis of the latter. A continuation of the hydrolytic action results in the formation of sugars. The principal dextrins are erythrodextrin, achroödextrin, and maltodextrin, all of which have the same relative composition as starch $(C_6H_{10}O_5)_n$; their molecular weights, however, are unknown.

DEXTROSE is one of the simplest forms of sugar. It belongs to the glucose group—carbohydrates represented by the formula $C_6H_{12}O_5$.

INVERT SUGAR.—Cane sugar is inverted by treatment with dilute acids or by invertin (an enzyme produced by the yeast plant); the product of the reaction, which is a mixture of equal parts of dextrose and levulose, is known as "invert sugar."

$$C_{12}H_{22}O_{11} \text{ (cane sugar)} + H_2O \text{ (water)} =$$
$$C_6H_{12}O_6 \text{ (dextrose)} + C_6H_{12}O_6 \text{ (levulose)}$$

The sugar of the grape consists of dextrose and levulose in equal proportions.

MALIC ACID ($C_4H_6O_5$).—An organic substance of which there are three modifications distinguishable by their action on polarized light. It was first discovered in unripe apples. It is obtained in various ways—one by the reduction of ordinary tartaric acid.

ACETIC ACID ($C_2H_4O_2$), the sour principle of vinegar, is found in the juices of various plants, and may be produced by the oxidation of alcohol.

LACTIC ACID ($C_3H_6O_3$) is formed in general whenever sugar or starch undergoes lactic fermentation, in the presence of decaying nitrogenous matter, or when sugar is heated with alkalies.

TARTARIC ACID ($C_4H_6O_6$) occurs abundantly in vegetables. It is commercially obtained from argol, a product of the fermentation of grape juice.

GLYCERINE OR PROPENYL ALCOHOL ($C_3H_8O_3$) is produced in small quantities during the alcoholic fermentation of sugars, but its chief source is animal fats.

Considering the real nature of the substances which importers suggest occasion dissimilarity in material between sake and sherry wine, their claim appears untenable. A decided relationship in the general nature and composition of these is sufficiently clear. And assuredly any differences are not adequate to overcome other points of similarity between the two. The acids are all organic, and possible results of fermentation; the other constituents in question are different kinds of sugars, or starch in the process of conversion into sugar.

The materials to be compared are not rice and grapes, berries or fruits, but the essential products from these resulting through radical changes, physical and chemical. The original things as they grew do not much resemble each other; but from every one of them sugar may be obtained; and the sugar products certainly are similar. And so it is with sake and wine.

Rye does not resemble an apple or stalk of cane; but whisky from rye, brandy from apples, and rum from cane are all similar in material, quality and use.

Witnesses.

Many witnesses were introduced who spoke concerning the characteristics of sake, so far as determinable by the eye, taste, and smell.

Thirty-seven—scientists and chemists, wine producers, brewers, importers, and others—testified for the Government. None of them is directly interested in the result of this proceeding.

Twenty-four testified for the importers. Ten were wine and liquor dealers in Honolulu, nine of whom have protests pending against the classification of sake by similitude to wine, and are therefore directly interested in the result of this proceeding. Of the remaining ones, three were chemists, one a wine manufacturer, one a physician, and one a custom-house broker; others were bankers and dealers in general merchandise in Honolulu who did not assume to qualify as wine experts. The testimony of some of these supports the Government's contention.

A brief summary of the testimony follows.

The Government's witnesses.

Dr. H. W. WILEY (R., 98), Chief of Bureau of Chemistry, United States Department of Agriculture. Highest percentage of alcohol in beers is 6, and occasionally 7 per cent; carbonic-acid gas, one of the characteristics of beer, is always found in that beverage in all countries; sake and Jiminez & Lamothe sherry have the same degree of dryness and some of the same characteristics; the resemblance in flavor is quite marked. "Sake resembles this beverage (Jiminez & Lamothe sherry) more than any other kind of beverage I have ever tasted. Taking beverages by classes, such as wines, beers, liquors, etc., so far as my experience goes, and it is very extensive, sake most resembles a dry sherry." It more nearly resembles a vinous liquor of a high content of alcohol and what is called "fortified wines" than it resembles spirituous or malt liquors; there is no pronounced relation between general taste, flavor, and characteristics of sake and beer; the term "beer" would not cover a beverage which contained no hops, and beer from which carbonic-acid gas is allowed to escape would not be merchantable. "I consider sake a still beverage; I do not think it is an effervescent beverage at all; beer is never used still as a beverage."

W. D. BIGELOW (R., 92), chemist, United States Department of Agriculture. "Sake would be classed more nearly with the sherry type than anything else that I know of all the beverages I have had occasion

to examine; as to taste it resembles sherry flavor." Its process of manufacture is similar in the main to that of wine.

ALBERT SCHNEIDER (R., 57), teacher of botany and related sciences, California College of Pharmacy. Alcoholic strength of sake varies between a possible minimum of 13 per cent (although rarely as low as that) and a possible maximum of 19 per cent; in odor and taste and other properties it is more like wine than beer; it produces a very rapid evanescent form of intoxication, and has a decided wine-like taste, wine-like acidity, and wine-like alcohol taste; beer usually contains 3 or 4 per cent of alcohol, and is taken in large quantities, comparatively speaking, and sake in small quantities.

WILLIAM WENZEL (R., 60), chemist, United States custom service. Sake is nearer to wine than beer in taste.

CHARLES S. ASH (R., 61), assistant superintendent and chemist, California Wine Association. Sake resembles wine as to percentage of alcohol, absence of carbonic-acid gas, color, and taste; it is like an unfinished sherry or sherry material in taste.

ARTHUR LACHMAN (R., 64), consulting chemist in wines. Sake resembles wine in color and taste; it resembles a strong white wine, in which class sherry material belongs. It tastes more like wine than beer, because of greater percentage of alcohol.

FRANCIS WYATT (R., 84), official chemist United States Brewers' Association. The yeast found in sake has practically the same physical characteristics as

wine yeast and is entirely dissimilar from beer yeast; malt could not be produced from rice by any brewing process; sake closely resembles sherry wine.

ROBERT WAHL (R., 109), president of Wahl-Henius Institute of Fermentology, Chicago. Sake closely resembles a wine of the type of a dry sherry; it "is a stronger alcoholic beverage than any beer I have ever tasted." The fermentation process in manufacturing sake resembles that employed in wine production, with exception of the yeast; resemblance between sake and Jiminez & Lamothe sherry "is so great that I would have pronounced the sake product a dry sherry unhesitatingly had I not known or imagined its origin;" the character of Duff Gordon sherry is that of a dry sherry, and there is as much resemblance between it and sake as between different brands of dry sherry.

Dr. ALFRED SCHEDLER (R., 119), chief chemist, Pabst Brewing Company. Points of dissimilarity between sake and beer are the larger amount of alcohol in sake, lack of carbonic acid gas and hops, and flavor and taste; there is no similarity between odor of sake and beer; sake closely resembles some vinous liquor; the malting process described in Nishimiya record (R., 18) is not a malting process; never knew of any beer that did not contain carbonic acid gas in its finished state.

H. AUGUST HUNICKE (R., 123), chemist, Annheuser Busch Brewery. He does not consider method described in Nishimiya record (R., 18) as brewing process; "no close similarity whatever between that

[sake] and any beer that I know;" in taste and odor it is "characteristically different from any beer with which I am familiar." "I classified it [sake] at once, as belonging to the type of fortified wines, as far as the percentage of alcohol goes." It "is a very unusual phenomenon to see fermentation going on to 18 per cent of alcohol. I have never heard of a yeast doing that. There must be some special condition there to bring about that change."

PERCY T. MORGAN (R., 62), president California Wine Association. Sake is similar to wine as to absence effervescent qualities, clearness, and color; it resembles wine "more than any other product I know of."

C. SCHILLING (R., 63), dealer in California wines and brandies—in business thirty-four years. Sake is a crude article the same as sherry material; in absence of carbonic-acid gas sake is similar to wine.

P. C. ROSSI (R., 63), president Italian Swiss Colony, producers of wines and brandies—in wine business since 1881. Similarity between sake and sherry material is in color, taste, and alcoholic strength; neither contains carbonic-acid gas.

FERDINAND FROHMAN (R., 65), manager sales department, California Wine Association. Sake is similar to wine in its general appearance, color, taste, and alcoholic content, absence of carbonic-acid gas, and tendency to intoxicate.

ALEXANDER D. SHAW (R., 69)—in wine business forty-five years. Sake is close to a low-grade Spanish

wine grown in the south of Spain; sake and Jiminez & Lamothe sherry are similar in color, taste, flavor, and general characteristics; Duff Gordon sherry is similar in characteristics to sake. "Sake more closely resembles wine than anything else I know of."

JULIUS WILE (R., 71), wine importer. Sake closely resembles a poor type of Spanish sherry.

GEORGE B. SADLER (R., 72), wine importer. Sake resembles Jiminez & Lamothe sherry in flavor and taste. It has certain "bouquet and flavor of its own, as all wines have."

CHARLES R. OSBORN (R., 73), agent for foreign shippers and dealers in wines—has been over wine countries of Europe—France, Spain, and Portugal. Sake more closely resembles Jiminez & Lamothe sherry than it does Duff Gordon sherry; on first examination he thought sake was "poor wine and had gone rotten."

CHARLES BELLOWS (R., 75), wine merchant—in business thirty-three years. Sake has general characteristics of wine, in appearance, odor, etc.; without knowing anything about it "I should immediately class it as a wine;" Manzanilla sherry closely resembles sake; sake is similar to sherry wine that has gone wrong.

ERNEST C. LA MONTAGNE (R., 76), importer of wines and liquors. Sake more closely resembles wine than any other article; it has all the characteristics of wine, with a peculiar flavor of its own; it is a sweeter wine than either the Jiminez & Lamothe or Duff Gordon sherry.

HENRY E. GOURD (R., 79), importer of wines and spirits, New York. Sake is somewhat of the type of the low-grade sherries; there is no real difference between Jiminez & Lamothe sherry and sake, except the latter is coarser; there is also a difference in taste. "If I were to classify that article [sake] as one of the classes of materials which I buy and sell, I would consider it more nearly like a very low-grade sherry."

W. NISHIMIYA (R., 82), restaurateur, New York. Usually serve sake in small glasses and occasionally in half-pint bottle. It is drunk warm or cold.

IWAO KAWAGUCHI (R., 83), tea importer. Sake is drunk warm or cold.

HENRY F. WINDLER (R., 67), brewmaster, Enterprise Brewing Company, San Francisco. In beer business all his life and familiar with sake. The difference between sake and beer is in alcoholic content, taste, and odor; sake contains no carbonic acid gas and resembles taste of wine. "I find no points of similarity whatever between sake and beer."

JULIUS A. HIERONIMUS (R., 67), brewmaster, Wunder Brewery. Twenty years' experience. There is no similarity between beer and sake as to taste and appearance; beer has flavor of malt and hops, and freshness of carbonic-acid gas also helps to flavor it, which is entirely lacking in sake; beers contain from 2½ to 5 per cent of alcohol.

JOHN B. OPPEL (R., 69), brewmaster, Albany Brewery. Similarity between sake and beer only in

point of taste. "It tastes to me as if it has two or three times more alcohol than our beers."

RICHARD J. T. COOK (R., 81), manager of United States and Canadian trade for Bass, Radcliffe & Creighton, of England. Sake does not resemble ale or beer in any respect; no knowledge of any ales, beers, or porters which do not contain some percentage of carbonic-acid gas.

WILLIAM FORN (R., 104), brewmaster, Christian Morlein Brewing Company, Cincinnati. Unable to discover any similarity between sake and beer; beers contain carbonic-acid gas in commercial state; no knowledge of any beers that are made without hops; percentage of alcohol in beer varies from 3½ to a trifle over 4 per cent; the taste of sake is somewhat similar to sherry.

CORNELIUS SIPPEL (R., 114), superintendent brewmaster, Schoenhofen Brewing Company, Chicago. No knowledge of any beers, ales, or porters that do not contain carbonic-acid gas in their marketable state; highest percentage of alcohol "in our beers" is about 6 per cent; "average percentage of alcohol in breweries that I have been connected with has been from 3½ to 4½ per cent;" sake has a peculiar aroma, a kind of oriental taste; "it has rather a peculiar distinctive nature of its own, but I have drunk some other wines which are somewhat similar to this, only the flavor varies somewhat."

FRITZ BOCK (R., 116), superintendent, Pabst Brewing Company, Milwaukee. "There is no similarity between sake and any beer that I know. It is an

entirely different thing from beer;" he has no knowledge of any beer that does not contain carbonic-acid gas or that is made without hops; percentage of alcohol in beers is from 3½ to 7 per cent; the whole method of making sake as described in Nishimiya record (R., 18) is not a brewing process.

ALFRED UIHLEIN (R., 117), superintendent, Schlitz Brewing Company. Average percentage of alcohol in beers is from 3½ to 4 per cent, sometimes running as high as 7; process of making sake as described in Nishimiya record (R., 18) neither a malting nor brewing one; never heard of beer being made without hops; no resemblance in odor between sake and beer; carbonic-acid gas in beer is an important factor. "The aroma of sake reminds me somewhat of sherry wine."

JOSEPH UIHLEIN (R., 120), brewer with Jos. Schlitz Brewing Company, Milwaukee. Process of making sake as described in Nishimiya record (R., 18) is not a malting one; beer without carbonic acid gas would not only be flat but would be unsalable on any market in this country; "there seems to be no similarity whatever between sake and any beer I know of."

WILLIAM KREIGER, (R., 122), brewer and maltster, Annheuser Busch Brewery, St. Louis. He does not consider process described in Nishimiya record (R., 18) as a malting or brewing one; sake tastes more like liquor than beer; all beers contain carbonic-acid gas; the "highest percentage of alcohol in beers produced at our breweries is about 4 per cent."

JOHN T. DARE (R., 66), United States appraiser, San Francisco. Identifies wrapper on bottle of sake

which was imported from Japan, which designated contents as "Nichibei Wine;" "Rice Wine" frequently appears on wrappers on bottles of imported sake.

A. S. PERSH (R., 57), Japanese interpreter. The word "sake" came into Japan about four hundred years ago, originally from China into southern Korea, thence into southern Japan, and subsequently became general throughout the islands. "From its introduction until now the word has been used to denote generally wine or any intoxicating liquor." Sake is generally drunk warm but sometimes cold and "in quantities from one-half a whisky glass to one-half a tumbler."

WILLIAMS A. WILLIAMS (R., 75), special agent, Treasury Department. Identifies two cases of Jiminez & Lamothe sherry (Govt. Ex. 3) which he obtained in Malaga, Spain, in March, 1906.

The Importers' Witnesses.

CORBET ALFRED PEACOCK (R., 25), saloon keeper. In sake business eight years in Honolulu.

CHARLES E. WETMORE (R., 25), employee, California Consolidated Vineyard Company. Sake resembles beer and has the odor of beer yeast. "I think it is mostly wild yeast in sake. It is all wild yeast in wines, except where some of our scientists get selected yeast; but it is the practice of ninety-nine out of a hundred to make it out of wild yeast;" no

flavor of hops in sake; genuine beer will not foam; it is not complete and aged and fit to drink if it foams.

ARTHUR WILHELMJ (R., 31), fermentologist. Principal difference between sake and wine is in contents of different acids and residues; the taste of sake is a little similar to wine, but is absolutely different; sake has the odor found in fermented beer, and its chemical composition is entirely different from wines and more like beers, because the process of fermentation is similar to that used in beer manufacture. "*I can not say that sake tastes like beer, ale, or porter.*"

LOUIS FALKENEAU (R., 32), chemist. By comparison sake is chemically different from wine, as it contains substances which wine does not contain, especially dextrines and possibly some maltose; there is similarity between the extracts of sake and beer. There is dissimilarity in the taste of sake and wine. "There is no similarity in the taste of sake to beers, ales, or porters, except that of the yeasty taste which some badly prepared beers have in common with sake." Sake resembles beer more closely than wine in odor.

H. J. JOHNSTON (R., 33), shipper and custom-house broker. Familiar with trade designation of sake amongst merchants from 1887 to 1898. "I have seen it labeled sometimes in bottles and sometimes in tubs; on the tubs there was no brand except Japanese characters, which I could not read. In the bottles I have seen the Japanese characters and sometimes "sake"—different kinds from different brewers.

Never dealt in sake and never saw any of it labeled "rice wine."

JOKICHI TAKAMINE (R., 34), chemist. Sake is usually drunk in small cup, and sometimes in a large one 7 or 8 inches in diameter, with about one-fifth of its diameter in depth. It has its own characteristic flavor, "which is different from any other beverage that I have ever tasted." It most resembles distiller's beer. The flavor and taste of wine and sake, *except as to alcoholic strength*, are totally different. Never knew of any beer that was produced without hops, except distiller's beer, and that is not a commercial beer, but simply an intermediate stage in the making of beer. *Beer would not keep without the use of hops, which are not necessary in the making of sake or wine. Sake could not be made by the ordinary brewing process used in making beer.* "Sake is closer to that style of wine (Jiminez & Lamothe sherry) than to any beer that I know of in its taste." After examining Duff Gordon sherry witness states that sake more closely resembles it than "any beer that I know of," on the principle that they are about equal in alcoholic strength, but in flavor and real taste one is distinct from the other.

GEORGE O'NEILL (R., 42), employee of W. C. Peacock & Co., liquor dealers, Honolulu. There is difference in taste between sake and Duff Gordon sherry, and no resemblance in taste or odor between it and Jiminez & Lamothe sherry; sake bears a little resemblance in color to Jiminez & Lamothe sherry.

Witness testified that his employer "is very much interested in sake protests."

AMBROSE WIRTZ (R., 43), manager and head salesman, tobacco and liquor department, H. Hackfeld & Co. (Limited), Honolulu. Greatest similitude between sake and Budweiser in odor and taste; no similitude in taste between sake and Duff Gordon sherry; "the taste of the sake is refined while the sherry is absolutely not what we would call 'polished;' the sake is decidedly closer to one of those beers in taste than it is to one of the sherry wines."

[Witness's employer has protests pending against present classification of sake, R., 12.]

D. H. LEWIS (R., 45), wine and liquor dealer, Honolulu. Sake has a strong, sharp, pungent alcoholic taste; beer has a much milder flavor, and "does not resemble the taste of the sake in any way;" sake does not resemble Jiminez & Lamothe, Duff Gordon, or Emperador sherry in taste or smell. Witness has protests pending against present classification of sake.

WILLIAM LISHMAN (R., 46), manager, MacFarlane & Co. (Limited), wine and liquor dealers, Honolulu. Sake does not resemble Emperador, Jiminez & Lamothe, or the Duff Gordon sherries in odor or taste; there is a greater difference between sherry and sake than between sake and beer; of all beverages sake is nearer to beer than anything else. Witness has protests pending against present classification of sake.

M. A. GONSALVES (R., 47), of Gonsalves & Co., wine and liquor dealers, Honolulu. No resemblance in color, taste, or odor between Jiminez & Lamothe

sherry and sake. Witness has protests pending against present classification of sake.

Dr. H. F. HUMPHREYS (R., 49), physician, Honolulu: "Taking into consideration the carbonic-acid gas, I would say that sake was more similar to Jiminez & Lamothe sherry than it is to beer, because beer sparkles. In alcoholic strength it is nearer to sherry. Taking away the sparkling, I would say they were closer in taste; it might be closer in flavor. If sake is like anything, it is more like Chinese Sam Shu. Of all beverages that I have run across, aside from Sam Shu, sake comes closer to the Jiminez & Lamothe sherry than anything I have ever seen."

THOMAS F. MCTIGHE (R., 51), wine and liquor dealer, Honolulu. No resemblance in taste or odor between sake and Duff Gordon and Jiminez & Lamothe sherries; in general characteristics—that is, color, taste, odor, and alcoholic strength, etc.—sake is different from Jiminez & Lamothe sherry. Witness has protests pending against present classification of sake.

J. H. HERTSCHE (R., 51), manager of Moana Hotel, Honolulu. No resemblance in taste between sake and Emperador or Duff Gordon sherries, but there is in odor; no similarity between Jiminez & Lamothe sherry and sake; sake is more similar to beer in odor, taste, absence of carbonic acid gas, color, etc., than to Jiminez & Lamothe wine.

M. KISHI (R., 52), manager Yokohama Specie Bank, Honolulu. Sake is drunk out of a small cup,

either warm or cold; in taste and odor it is different from Duff Gordon and Jiminez & Lamothe sherries. Witness conceded not a wine expert.

T. SUMIDA (R., 53), dealer in liquors, Honolulu. Sake does not have the taste or odor of wine; it is different from Jiminez & Lamothe sherry. Witness states that he could consume two quart bottles of sake; some of his countrymen drink from one to two cups, while others consume a gallon; no resemblance between sherry and sake. Witness has been protesting against present classification of sake ever since he began to import it.

T. IWANAGA (R., 53), wholesale dealer in wines, Honolulu. Sake is different in taste and odor from Duff Gordon and Jiminez & Lamothe sherries; some persons drink one or two bottles, while others drink a gallon, of sake. Witness has protests pending against present classification of sake. Conceded not a wine expert.

S. KOJIMA (R., 54), dealer in wines, etc., Honolulu. Sake is different in odor and taste from Emperador, Duff Gordon, and Jiminez & Lamothe sherries; the Japanese drink it warm, in quantities from two to three quart bottles, more or less. Witness has protests pending against present classification of sake.

K. ODO (R., 54), wine and liquor dealer, Honolulu. No resemblance in odor or taste between sake, Emperador, Duff Gordon, or Jiminez & Lamothe sherries. Sake is drunk warm or cold. Witness has protests pending against its present classification. Conceded not a wine expert.

G. NAKAMURA (R., 55), bank clerk, Honolulu. In odor and taste sake is different from Emperador, Duff Gordon, and Jiminez & Lamothe sherries; it is taken in quantities of from a cup to three or four bottles, and either warm or cold—generally warm. Witness conceded not a wine expert.

T. MURAKAMI (R., 55), dealer in general merchandise and provisions, Honolulu. No similitude in odor or taste between sake and Emperador, Duff Gordon, or Jiminez & Lamothe sherries; some of his countrymen drink one bottle and some less, while others drink three or four bottles. Witness conceded not a wine expert.

J. OSHIMA (R., 56), dealer in general merchandise, Honolulu. No similarity between Emperador, Duff Gordon, or Jiminez & Lamothe sherries. Witness conceded not a wine expert.

M. KAWAHARA (R., 56), dealer in general merchandise and provisions, Honolulu. In odor and taste sake is different from Emperador, Duff Gordon, and Jiminez & Lamothe sherries; some take only one cup, and others three or four bottles. Witness conceded not a wine expert.

S. B. FUJIYAMA (R., 56), general merchandise, Honolulu. In odor and taste there is no resemblance between sake and Emperador, Duff Gordon, and Jiminez & Lamothe sherries; some people take only one cup, and others three or four bottles; many drink sake cold. Witness conceded not a wine expert.

VII.

SIMILARITY OF SAKE TO BEER.

Undoubtedly there is some resemblance between sake and beer, but the similarity to still wine is more pronounced. In view of the fixed purpose of Congress, revealed by numerous provisions of the tariff act, to adjust rates with reference to alcoholic contents together with the further express provision of section 6 requiring the highest rate where similarity to two enumerated articles exists, we submit that any doubt should be resolved in favor of the Government. If, however, acting upon its own independent investigation this court should conclude that the Board of General Appraisers has always been wrong, that the Circuit Court of Appeals at San Francisco likewise erred, and that sake is more nearly like beer than wine, then the rate should be 20 cents per gallon.

VIII.

THE ACTION OF THE COMMISSIONER OF INTERNAL REVENUE REQUIRING MANUFACTURERS OF SAKE TO TAKE OUT THE SAME LICENSE AS BREWERS AND TO PAY A LIKE TAX UPON THEIR OUTPUT IS WITHOUT SIGNIFICANCE.

The statutes under which the commissioner acted are set out *ante* (p. 4); the letters relating to taxation of sake makers and their product are *post*, Appendix 2. His action must be considered in view of the applicable statutes and his duty to the Government.

The problem presented was whether makers of sake should be licensed and their output taxed in the ways followed or permitted to go free. If serious doubt existed, his duty was to impose the tax and give opportunity for resort to the courts; otherwise there would have been no way to obtain a judicial construction of the law.

The language of the statute clearly supports the commissioner's action. He was required to decide whether a producer of sake is a "person who manufactures fermented liquors of any name or description for sale, from malt, wholly or in part, *or from any substitute thereof;*" the question before the collector of customs was whether sake is similar to wine.

Consideration of the actual points presented and decided by the two officers seems to necessitate the conclusion that the commissioner's rulings can have no weight in the present controversy. There is no inconsistency between requiring of a sake manufacturer the same license as of brewers under the internal-revenue laws, and classifying sake when imported by similitude to wine. Moreover, the letter of the commissioner mentioning sake by name was written in 1902, about the time protests against the collector's classification began; and indicates that the ruling of customs officers was understood by interested parties (There is nothing to show the character of the "rice beer" mentioned in the letter of 1888. It was probably not sake.)

The commissioner recognized the practice of the customs department; did not assume to do anything contrary thereto; and nobody was misled by his action.

We respectfully submit that the judgment of the court below should be affirmed.

GEORGE W. WICKERSHAM,
Attorney-General.

J. C. MCREYNOLDS,
Special Assistant to the Attorney-General.

NOVEMBER, 1909.

Appendix 1.

Tariff act 1897 (30 Stats., 205)—

Par. 2. All alcoholic perfumery, including cologne water and other toilet waters and toilet preparations of all kinds, containing alcohol or in the preparation of which alcohol is used, and alcoholic compounds not specially provided for in this act, sixty cents per pound and forty-five per centum ad valorem.

Par. 67. Medicinal preparations containing alcohol, or in the preparation of which alcohol is used, not specially provided for in this act, fifty-five cents per pound, but in no case shall the same pay less than twenty-five per centum ad valorem.

Par. 70. Preparations used as applications to the hair, mouth, teeth, or skin, such as cosmetics, dentifrices, pastes, pomades, powders, and other toilet articles, and articles of perfumery, whether in sachets or otherwise, not containing alcohol or in the manufacture of which alcohol is not used, and not specially provided for in this act, fifty per centum ad valorem.

Par. 263. Comfits, sweetmeats, and fruits preserved in sugar, molasses, spirits, or in their own juices, not specially provided for in this act, one cent per pound and thirty-five per centum ad valorem; if containing over ten per centum of alcohol and not specially provided for in this act, thirty-five per centum

ad valorem and in addition two dollars and fifty cents per proof gallon on the alcohol contained therein in excess of ten per centum; jellies of all kinds, thirty-five per centum ad valorem; pineapples preserved in their own juice, twenty-five per centum ad valorem.

SCHEDULE H.—SPIRITS, WINES, AND OTHER BEVERAGES.

SPIRITS.

Par. 289. Brandy and other spirits manufactured or distilled from grain or other materials, and not specially provided for in this act, two dollars and twenty-five cents per proof gallon.

Par. 290. Each and every gauge or wine gallon of measurement shall be counted as at least one proof gallon; and the standard for determining the proof of brandy and other spirits or liquors of any kind imported shall be the same as that which is defined in the laws relating to internal revenue: *Provided*, That it shall be lawful for the Secretary of the Treasury, in his discretion, to authorize the ascertainment of the proof of wines, cordials, or other liquors, by distillation or otherwise, in cases where it is impracticable to ascertain such proof by the means prescribed by existing law or regulations: *And provided further*, That any brandy or other spirituous or distilled liquors imported in any sized cask, bottle, jug, or other package, of or from any country, dependency, or province under whose laws similar sized casks, bottles, jugs, or other packages of distilled spirits, wine, or other

beverage put up or filled in the United States are denied entrance into such country, dependency, or province, shall be forfeited to the United States; and any brandy or other spirituous or distilled liquor imported in a cask of less capacity than ten gallons from any country shall be forfeited to the United States.

Par. 291. On all compounds or preparations of which distilled spirits are a component part of chief value, there shall be levied a duty not less than that imposed upon distilled spirits.

Par. 292. Cordials, liqueurs, arrack, absinthe, kirschwasser, ratafia, and other spirituous beverages or bitters of all kinds, containing spirits, and not specially provided for in this act, two dollars and twenty-five cents per proof gallon.

Par. 293. No lower rate or amount of duty shall be levied, collected, and paid on brandy, spirits, and other spirituous beverages than that fixed by law for the description of first proof; but it shall be increased in proportion for any greater strength than the strength of first proof, and all imitations of brandy or spirits or wines imported by any names whatever shall be subject to the highest rate of duty provided for the genuine articles respectively intended to be represented, and in no case less than one dollar and fifty cents per gallon.

Par. 294. Bay rum or bay water, whether distilled or compounded, of first proof, and in proportion for any greater strength than first proof, one dollar and fifty cents per gallon.

WINES.

Par. 295. Champagne and all other sparkling wines, in bottles containing each not more than one quart and more than one pint, eight dollars per dozen; containing not more than one pint each and more than one-half pint, four dollars per dozen; containing one-half pint each or less, two dollars per dozen; in bottles or other vessels containing more than one quart each, in addition to eight dollars per dozen bottles, on the quantity in excess of one quart, at the rate of two dollars and fifty cents per gallon; but no separate or additional duty shall be levied on the bottles.

Par. 296. Still wines, including ginger wine or ginger cordial and vermuth, in casks or packages other than bottles or jugs, if containing fourteen per centum or less of absolute alcohol, forty cents per gallon; if containing more than fourteen per centum of absolute alcohol, fifty cents per gallon. In bottles or jugs, per case of one dozen bottles or jugs, containing each not more than one quart and more than one pint, or twenty-four bottles or jugs containing each not more than one pint, one dollar and sixty cents per case; and any excess beyond these quantities found in such bottles or jugs shall be subject to a duty of five cents per pint or fractional part thereof, but no separate or additional duty shall be assessed on the bottles or jugs: *Provided*, That any wines, ginger cordial, or vermuth imported containing more than twenty-four per centum of alcohol shall be classed as spirits and pay

duty accordingly: *And provided further*, That there shall be no constructive or other allowance for breakage, leakage, or damage on wines, liquors, cordials, or distilled spirits. Wines, cordials, brandy, and other spirituous liquors, including bitters of all kinds, and bay rum or bay water, imported in bottles or jugs, shall be packed in packages containing not less than one dozen bottles or jugs in each package, or duty shall be paid as if such package contained at least one dozen bottles or jugs, and in addition thereto duty shall be collected on the bottles or jugs at the rates which would be chargeable thereon if imported empty. The percentage of alcohol in wines and fruit juices shall be determined in such manner as the Secretary of the Treasury shall by regulation prescribe.

Par. 297. Ale, porter, and beer, in bottles or jugs, forty cents per gallon, but no separate or additional duty shall be assessed on the bottles or jugs; otherwise than in bottles or jugs, twenty cents per gallon.

Par. 298. Malt extract, fluid, in casks, twenty cents per gallon; in bottles or jugs, forty cents per gallon; solid or condensed, forty per centum ad valorem.

Par. 299. Cherry juice and prune juice, or prune wine, and other fruit juices not specially provided for in this act, containing no alcohol or not more than eighteen per centum of alcohol, sixty cents per gallon; if containing more than eighteen per centum of alcohol, sixty cents per gallon, and in addition thereto two dollars and seven cents per proof gallon on the alcohol contained therein.

Par. 300. Ginger ale, ginger beer, lemonade, soda water, and other similar beverages containing no alcohol in plain green or colored, molded or pressed, glass bottles, containing each not more than three-fourths of a pint, eighteen cents per dozen; containing more than three-fourths of a pint each and not more than one and one-half pints, twenty-eight cents per dozen; but no separate or additional duty shall be assessed on the bottles; if imported otherwise than in plain green or colored, molded or pressed, glass bottles, or in such bottles containing more than one and one-half pints each, fifty cents per gallon and in addition thereto, duty shall be collected on the bottles, or other coverings, at the rates which would be chargeable thereon if imported empty.

Par. 301. All mineral waters and all imitations of natural mineral waters, and all artificial mineral waters not specially provided for in this act, in green or colored glass bottles, containing not more than one pint, twenty cents per dozen bottles. If containing more than one pint and not more than one quart, thirty cents per dozen bottles. But no separate duty shall be assessed upon the bottles. If imported otherwise than in plain green or colored glass bottles, or if imported in such bottles containing more than one quart, twenty-four cents per gallon, and in addition thereto duty shall be collected upon the bottles or other covering at the same rates that would be charged thereon if imported empty or separately.

APPENDIX 2–A.

TREASURY DEPARTMENT,
OFFICE OF INTERNAL REVENUE,
Washington, August 6, 1888.

SIR: Mr. Geo. A. Brevaldo, a liquor dealer at Columbus, Fla., who has paid the special tax, complains that "Mr. J. C. Thomas, of Ellaville, Madison County, Fla.," has been engaged in the business of selling so-called "rice beer" without paying the internal-revenue tax.

Rice beer, fermented, is a fermented liquor made from a substitute for malt within the meaning of the first subdivision of section 3244, R. S. Tax is imposed thereon by section 3339; the special tax of a brewer is required to be paid for its manufacture for sale; and dealers therein are required to pay special tax as malt-liquor dealers.

If Mr. Thomas has been engaged in selling such rice beer without having the requisite special-tax stamp, he should be reported to this office for assessment of the tax and 50 per cent additional.

You will please examine into this case and report the facts.

Respectfully yours,

J. S. MILLER,
Commissioner.

WHITFIELD WALKER, Esq.,
Collector, Jacksonville, Fla.

APPENDIX 2–B.

[From Synopsis of Treasury Decisions, January to June; 1898—No. 19025.]

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER INTERNAL REVENUE,
Washington, D. C., February 24, 1898.

SIR: The sample of a "wine-like product," called "malt wine," which you sent to this office on the 1st instant, together with a letter and formula relating thereto received by you from Mr. C. Glazer, 21 South Gay street, Baltimore, have been examined by the chemist here, who, under date of the 16th instant, reports that it contains 15.35 per cent of alcohol by volume and 12.42 per cent by weight and 14.27 per cent of total solid matter, and says:

> The process for this production is well described in Mr. Glazer's letter, and consists essentially in fermenting materials ordinarily used in the production of malt liquors, viz, malted grain, rice, glucose, etc., by yeast cells, taken from a wine. This yeast tends to produce the flavor and taste of wine instead of the flavor of a malt liquor, which would result if a beer yeast were used, and a wine-like liquor is the result.

Although, by the use of a wine yeast instead of a beer yeast, in the fermentation of the liquids used in the manufacture of this "malt wine," the result is a liquor which has both the appearance and the taste of wine, nevertheless it is not wine in any true meaning of the word, nor (as shown by the samples sub-

mitted, which were not "made in imitation of sparkling wine or champagne," nor "produced by being rectified or mixed with distilled spirits or by the infusion of any matter in spirits") is it such an imitation wine as section 3328, Revised Statutes, describes.

In the manufacture of the particular liquid submitted in this case for examination Mr. Glazer states that "barley malt was used, and as ferment the yeast from 1893 Steinberg Cabinet Wine." Whenever, therefore, this fermented liquor is made for sale, the manufacturer of it is required to pay special tax as a brewer under the first subdivision of section 3244, Revised Statutes, and to give notice and bond as a brewer under sections 3335 and 3336, Revised Statutes, and pay tax on the liquor under section 3339, Revised Statutes.

Will you please so inform Mr. Glazer? He states that, in the manufacture of a fermented liquor similar in appearance and flavor to this, there could be used, "if preferred, the juice of fruits." Where this is done, the ruling in this letter will, of course, not apply.

Respectfully yours, N. B. SCOTT,
Commissioner.

B. F. PARLETT, Esq.,
Collector Internal Revenue, Baltimore, Md.

APPENDIX 2–C.

[Treasury Decisions, Vol. V.]

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER INTERNAL REVENUE,
Washington, D. C., February 1, 1902.

SIR: Inclosed with your letter of the 15th ultimo is a communication addressed to you on the 14th by Mr. Thomas Fitch, an attorney representing certain persons who are desirous of engaging in the manufacture of sake, a Japanese fermented liquor made from rice, which has been classified as dutiable, when imported, at the rate provided for still wine (Treasury Decisions, internal-revenue ruling 15392).

In reply to your request for instructions as to how the manufacture and sale of this article is to be regarded under the internal-revenue laws, you are informed that while this fermented beverage is not produced from malt, it is produced from a substitute for malt, and is held to be a "similar fermented liquor" to beer, lager beer, ale, and porter, under the provisions of section 3339, Revised Statutes, as amended. Persons engaging in its manufacture will be required to qualify as brewers and comply with the law and regulations governing brewers, including payment of tax on their product at $1.60 per barrel. Sales of the article can lawfully be made only by persons duly qualified for the sale of fermented liquors.

Respectfully,

J. W. YERKES,
Commissioner.

Mr. ROY H. CHAMBERLAIN,
Collector of Internal Revenue,
Honolulu, H. I.

APPENDIX 3.

[Opinion, Board of General Appraisers, October 4, 1894 (*In re Woozen's* protest), that sake resembles still wine.—T. D. 15392.]

Opinion by Lunt, General Appraiser:

We find—

(1) The merchandise covered by this protest to be sake, imported from Japan into the port of New York in April and June, 1894, as shown above, and which was assessed with duty at $2.50 per gallon under paragraph 329 or 332. The importer claims the same to be dutiable at 50 cents per gallon under paragraph 336 as still wine.

(2) That sake is a liquor made from rice by a process of fermentation and pressing, and is not distilled liquor or spirits.

(3) That it contains from 11 to 14 per cent of alcohol developed by fermentation. It is not a wine the product of vinous fermentation, but in appearance, quantity of alcohol contained therein, and in its use and qualities as a beverage it resembles still wine.

It can not be classified under paragraph 329 as spirits manufactured or distilled from grain or other materials, because the word "spirits" implies a distilled liquor. Again, the cordials, liquors, etc., mentioned in paragraph 332 are all distilled or compounded with distilled spirits, and none of them are fermented beverages.

It is stated by some authors of repute that sake, like wine, occupies a place midway between beer and

brandy. Beer, ale, and porter are known as malt liquors, the grain used in their manufacture having been made into malt. In the manufacture of sake malting is carefully avoided, and no hops or other materials in addition to the grain are used, as in the manufacture of malt liquors.

It seems to us, therefore, that this liquor is dutiable at the rate provided for still wine, and the protests are sustained.

O

Office Supreme Court, U. S.
FILED.
AUG 1 1908
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States

.....TERM, 1908.

No. [redacted] 220.

Ex parte KOMADA & CO.,
Petitioners.

The petition of KOMADA & CO. for a writ of certiorari directed to and requiring the United States Circuit Court of Appeals for the Ninth Circuit to certify to and being before the Supreme Court for its review and determination the case entitled:

THE UNITED STATES OF AMERICA, Appellant,
vs.
KOMADA & CO., Appellee;

and numbered 1261 in said Circuit Court of Appeals.

THOMAS FITCH,
J. J. DUNNE,
Counsel for Petitioners.

IN THE

Supreme Court of the United States

.....TERM, 1908.

No.....

Ex parte KOMADA & CO.,

Petitioners.

The petition of KOMADA & CO. for a writ of certiorari directed to and requiring the United States Circuit Court of Appeals for the Ninth Circuit to certify to and being before the Supreme Court for its review and determination the case entitled:

THE UNITED STATES OF AMERICA, Appellant,

vs.

KOMADA & CO., Appellee;

and numbered 1361 in said Circuit Court of Appeals.

To the Honorable, the Supreme Court of the United States:

The petition of Komada & Co. respectfully shows to this Honorable Court as follows:

1. Your petitioners are subjects of the Emperor of Japan, but are now, and for a long time past have been, residents of the State of California in the United States of America; and during

all of said times, your petitioners have been, and now are, merchants engaged in the general merchandise and importing business under the firm name and style of Komada & Co., in the City and County of San Francisco, in the State of California.

2. That on the 25th day of November, 1904, 200 cases and 564 tubs of the article hereinafter mentioned, and described in the invoices as "Sake," were imported by your petitioners from the Empire of Japan into the United States of America, at the port of San Francisco, in the State and Northern District of California, by the steam vessel named "Korea," and thereupon said merchandise was entered at the custom house at said port for immediate consumption: that thereafter said merchandise was, by the Collector of said port, classified upon the return of the appraiser of said port as follows—the "sake" in bottles was classified as "still wine" dutiable at the rate of $1.60 per case, and the "sake" in tubs was classified as "still wine" containing more than fourteen per centum of absolute alcohol dutiable at the rate of fifty cents per gallon, both under Paragraph 296 of the Tariff Act of July 24th, 1897; and said entries were liquidated in

accordance with such classification, and the duty upon said cases and tubs of said merchandise so entered for immediate consumption as aforesaid was ascertained, levied and collected by said Collector; that thereafter your petitioners, being dissatisfied with said decision of said Collector and said classification of said merchandise involved herein, made and gave due protest and notice of such dissatisfaction on the ground that the merchandise in question is not a "still wine," nor dutiable as such, but should be admitted as,

1st. An article manufactured in whole or in part, not provided for, at twenty per cent ad valorem, under section 6 of the Tariff Act of July 24th, 1897; or,

2d. Malt extract, fluid, that in casks at twenty cents per gallon, that in bottles at forty cents per gallon, under Paragraph 298 and Section 7 of the same Act; or,

3d. As ale, beer or porter at twenty cents per gallon, in bulk, and forty cents per gallon in bottles, under Paragraph 297 and Section 7 of the same Act; or,

4th. The "Sake" in casks, if a still wine, is entitled to entry at forty cents per gallon as still

wine containing not over fourteen per cent alcohol, under Paragraph 296 of the same Act;

And your petitioners then and there paid the amount of the duty so as aforesaid ascertained and levied by said Collector, solely to obtain possession of said goods, and made and presented their claim that said entries should be readjus'ed and the amount overcharged refunded to them; that thereupon the invoice relating to the importation of said merchandise and all the papers and exhibits connected therewith, were duly transmitted to the Board of United States General Appraisers on duty at the port of New York, all as provided in the Customs Administrative Act of June 10, 1890; that thereafter on the 26th day of October, 1905, the said Board of United States General Appraisers, after taking evidence therein, made, gave and rendered their decision in said matter, reversing the decision of said Collector. and sustaining said protest in so far as it claimed that said "Sake" was dutiable as an article manufactured in whole or in part, not provided for, at twenty per cent ad valorem under Section 6 of said Tariff Act of July 24th, 1897, and holding and deciding that said "Sake" was not dutiable

at the rates applicable to still wines under Paragraph 296 of said Act, but was and is an article manufactured in whole or in part, not provided for, and subject to a duty of twenty per cent ad valorem, under Section 6 of said Act of 1897.

3. That thereupon, in due and proper time, the said Collector, being dissatisfied with said decision of the said Board of United States General Appraisers as to the construction of the law and the facts respecting the classification of such merchandise and the rate of duty imposed thereon under such classification, and in manner and form as required by law and Section 15 of said Customs Administrative Act of June 10, 1890, applied to the United States Circuit Court for the Northern District of California for a review of the questions of law and fact involved in said decision of said Board of General Appraisers; that such proceedings were thereupon had, that further evidence was duly taken before a referee appointed by said Circuit Court and introduced before and considered by said Court; that said Circuit Court found as facts that the merchandise comprising the importation involved, at all times was, and now is, known in trade and commerce as "Sake," and said merchandise is

"Sake"; and that said merchandise was not and is not "still wine" or any wine, and was not and is not dutiable as a still wine or any wine by similitude or otherwise, but said merchandise was and is a manufactured article and not provided for in said Tariff Act of July 24th, 1907, otherwise than under Section 6 of said Act at twenty per cent ad valorem, and that said merchandise was not, nor is it, a spirituous beverage, and said merchandise was not at any time and is not commonly, commercially, chemically or otherwise known as a spirituous beverage or a wine; that said Circuit Court found as conclusions of law that the merchandise in question is embraced within the terms and subject to the provisions of Section 6 of the said Tariff Act of July 24th, 1897, and is dutiable thereunder as a manufactured article at twenty per cent ad valorem and not otherwise, and that the decision of the Board of United States General Appraisers herein is affirmed and the action of said Collector in assessing and liquidating the amount of duties as aforesaid is hereby held to be erroneous; and that your petitioners are entitled to a judgment for excess duties collected without costs; and that, by its judgment in said matter, entered on the 14th day of July, 1906, it was considered and

adjudged by said Circuit Court that the merchandise in question in said matter is embraced within the terms and subject to the provisions of Section 6 of the Tariff Act of July 24th, 1897, and is dutiable thereunder as a manufactured article not otherwise provided for in said Act at twenty per cent ad valorem, and not otherwise; and it was further considered and adjudged that the decision of the Board of United States General Appraisers herein sought to be reviewed be, and the same hereby is, affirmed and sustained; and it was further considered and adjudged that the action of the Collector of Customs for the Port of San Francisco, in assessing and liquidating the amount of duties upon the merchandise in question herein, be, and it hereby is, held to be erroneous.

4. That thereafter, the said Collector, being dissatisfied with the aforesaid findings, decision and judgment of said United States Circuit Court, prayed and perfected an appeal to the United States Circuit Court of Appeals for the Ninth Circuit; that an order was entered allowing the withdrawal of the Exhibits from said Circuit Court and the transmission of the same to said Circuit Court of Appeals; that a tran-

script of the record was properly made up and with the Exhibits duly filed in said Circuit Court of Appeals on the 23d day of August, 1906; that thereafter and on, to wit, the 7th day of October, 1907, the parties made and entered into the following Stipulation, namely:

"Whereas, the record in the above entitled "cause, heretofore filed, is unnecessarily large "and somewhat confused in arrangement, and it "seems desirable that the same be condensed, "and, so far as practicable, reduced to narrative "form, counsel stipulate that the attached Con- "densed Record shall be substituted for the orig- "inal now on file, and be printed under their "direction, and that it shall be treated in all "respects as though it had come up from the "Court below, duly authenticated by the Judge "and Clerk, under seal.

"Counsel further agree to ask the Court to "give effect to this stipulation by directing a "proper decree."

And thereupon said Circuit Court of Appeals made its order that the aforesaid substitution be made and that said Condensed Record be printed under direction of Counsel, and treated in all respects as provided in their stipulation; that said Condensed Record was so printed and filed

in said cause in said Circuit Court of Appeals conformably in all respects to said stipulation; that said Condensed Record was and is the Record of the cause upon which said Circuit Court of Appeals thereafter made and gave its decision and judgment; and that a certified copy of the entire record of said case in said Circuit Court of Appeals, to wit, a certified copy of said Condensed Record, is herewith furnished, and hereto annexed, and filed herewith, as part of this application, in conformity with Rule 37 of this Honorable Court relative to cases from the Circuit Court of Appeals, and the same is marked Exhibit A.

5. That thereafter, on May 18th, 1908, said United States Circuit Court of Appeals made, gave and rendered its decision and judgment in said matter in the words and figures following, to wit:

"UNITED STATES CIRCUIT COURT OF
"APPEALS, FOR THE NINTH CIRCUIT.

"THE UNITED STATES OF AMERICA,
"Appellant.

"vs.

"KOMADA & CO.,
"Appellees.

"Robert T. Devlin, U. S. Attorney, for Appel-
"lant.

"Stanley Jackson, Attorney for Appellees.

"Thomas Fitch, of counsel for Appellees.

"Before Gilbert and Ross, Circuit Judges, and
"De Haven, District Judge.

"De Haven, District Judge. This case is be-
"fore us on an appeal, by the United States, from
"a judgment of the United States Circuit Court,
"for the Northern District of California, affirm-
"ing the decision of the Board of General Ap-
"praisers, as to the amount of import duty to
"which the Japanese beverage, known as sake, is
"subject.

"The decision of the Board of General Ap-
"praisers was that sake is dutiable at 20 per
"cent. ad valorem, as a non-enumerated manu-
"factured article, under Section 6 of the Dingley
"Tariff Act of July 24th, 1897, (30 St. 151) and
"the main contention of the government, on this
"appeal, is that merchandise of this character is
"subject to a higher duty as a still wine, by simil-
"itude, under Section 7, of the Act referred to,
"which provides:

> " 'That each and every imported article,
> " 'not enumerated in this Act, which is sim-
> " 'ilar, either in material, quality, texture,
> " 'or the use to which it may be applied, to
> " 'any article enumerated in this Act as
> " 'chargeable with duty, shall pay the same

"'rate of duty which is levied on the enu-
"'merated article which it most resembles
"'in any of the particulars before men-
"'tioned. * * *'

"It appears from the record that prior to 1894, "sake was classified, by the customs officers at "New York, as distilled liquor, and in that year "a protest was made against that classification, "by an importer; the protestant contending that "the article was dutiable as a still wine, by simili-"tude. This protest was sustained by the Board "of General Appraisers. In re Woozens, G. A. "2789, T. D. 15392.

"The Government acquiesced in this ruling "and the classification, fixed thereby, continued. "without protest, until March, 1902, when H. "Hackfeld & Co., an importer of Honolulu, pro-"tested against such classification, claiming 'that "'sake should be assessed for duty as ale, porter "'or beer, by similitude, at the rate of 40c per "'gallon, if in bottles or jugs, or at 20c per gal-"'lon, if not in bottles or jugs, or as a non-enu-"'merated article at the rate of 20c per cent ad "'valorem.'

"This protest was overruled by the Board of "General Appraisers. (T. D. 24410; G. A. 5334). "The Board holding that sake 'should be held to "'be so far similar to still wine as to be classed "'as wine by similitude. It is similar in the "'amount of alcohol and other constituent ele-

" 'ments; also in quality, general appearance,
" 'and somewhat in taste.'

"No appeal was taken from this decision; but "on April 16, 1903, the Collector of Customs at "New York, having assessed an importation of "sake, for duty, at 50c per gallon, as a still wine, "the importer, W. Nishimiya, filed a protest "against the decision. This protest was over- "ruled by the Board of General Appraisers, and "the importer appealed to the United States Cir- "cuit Court, for the Southern District of New "York, and the decision of the Board of General "Appraisers was reversed by that Court and sake "held to be dutiable at 20c per cent, ad valorem, "as a non-enumerated manufactured article, un- "der Section 6, of the Tariff Act of 1897. (*Nish- "imiya vs. United States,* 131 Fed. 650).

"This decision was affirmed by the Circuit "Court of Appeals, for the second Circuit, the "Court saying:

> " 'The similarity to still wines, based upon
> " 'the large amount of alcohol found in the
> " 'imported merchandise, presents the
> " 'strongest reason in justification of the
> " 'Collector's classification. * * *
>
> " 'But sake has so many characteristics
> " 'which are not found in either beer or
> " 'wine, its ingredients are so unusual and
> " 'the process of its manufacture so unique,
> " 'that it may fairly be held that it is no-

" 'where described, except by the general
" 'language of Section 6.'

"*United States* vs. *Nishimiya,* 137 Fed.
"396.

"In the case now before the Court the Col-
"lector of Customs, at San Francisco, assessed
"the merchandise, in question, at the same rate
"as that prescribed for still wines, and upon ap-
"peal the Board of General Appraisers reversed
"this action and held sake to be subject to duty
"as a non-enumerated manufactured article, un-
"der Section 6 of the Tariff Act of 1897.

"The United States being dissatisfied with this
"decision, brought the case before the Circuit
"Court for the Northern District of California,
"for review.

"The case was heard in that Court upon the
"evidence adduced before the Board of General
"Appraisers, and additional evidence submitted
"by both parties, under Section 15, of the Act of
"June 10th, 1890, (26 Stat. 138) and the decision
"of the Board of General Appraisers was af-
"firmed.

"1. The question whether a non-enumerated
"article is similar to one named in the Tariff
"Act, and for that reason subject to a like duty,
"is one of fact.

"*Wills* vs. *Russel,* 100 U. S. 621,
"*Herman* vs. *Arthur,* 127 U. S. 363.

"And the findings of the Board of General Ap-

"praisers, as to that fact, will not be disturbed,
"by the Court, unless clearly contrary to the evi-
"dence or when in the proceeding for a review
"of its decision, evidence, of a material char-
"acter, is presented to the Court. In the present
"case the Court has before it additional evi-
"dence, not before the Board of General Ap-
"praisers, and the record is much more full and
"complete, than that before the Circuit Court of
"the Southern District of New York, and the
"Circuit Court of Appeals for the Second Cir-
"cuit, in the case of U. S. vs. Nishimiya, above
"referred to. We must therefore determine the
"question of similitude, here presented, without
"aid from the ordinary presumption which would
"otherwise attach to the finding of the Board of
"General Appraisers, and the very great weight
"to which the decision of the courts, just men-
"tioned, in the case of U. S. vs. Nishimiya, would
"be entitled—if the record now before us was
"the same as that submitted to those courts in
"that case.

"Section 7 of the Dingley Tariff Act provides
"that when a non-enumerated article 'is similar
" 'either in material, quality, texture, or the use
" 'to which it may be applied, to any article
" 'enumerated in the Act, it shall pay the same
" 'rate of duty which is levied on the enumerated
" 'article, which it most resembles, in any of the
" 'particulars before mentioned.'

"One of the definitions of the word 'similar,' "which is given in Webster's Dictionary, is:

" 'Nearly corresponding; resembling in
" 'many respects; somewhat like; having
" 'a general likeness.'

"We think it is in this sense the word is used "in the section just quoted. The language of the "statute is that each imported article, not enu- "merated, which is similar 'either in material, " 'quality, texture, or the use to which it may be " 'applied, shall pay the same rate of duty which " 'is levied on the enumerated article which it " 'most resembles, in any of the particulars be- " 'fore mentioned'; thus showing that the ar- "ticle need not be the same in all respects, but "that the required similarity is shown if there is "a resemblance, either in material, quality, tex- "ture, or the use to which it may be applied. "And this similarity must, of course, be a real, "or substantial similitude, in some one of the "essential particulars named.

"*Murphy* vs. *Arnson,* 96 U. S. 131.
"*Arthur* vs. *Fox,* 108 U. S. 125.
"*Waddell* vs. *United States,* 124 Fed. 301.

"As neither wine nor sake has texture, the only "possible resemblance between them must be in "material, quality, or use.

"It is claimed, upon the part of the importer, "that there is no similarity in the material from "which sake and still wine are made, as wine is a

"fermented product of the juice of grapes, or "other fruits, while sake is a product of the fer- "mentation of rice—and made by a process sim- "ilar to that employed in the manufacture of "beer. This difference, however, in the original "materials, from which sake and wine are made. "is not, in our opinion, controlling, as the law, in "fixing the rate of duty, concerns itself with the "condition of the article at the time of importa- "tion.

"*United States* vs. *Schoonling,* 146 U. S. "76.

"*United States* vs. *Woton,* 53 Fed. 344.

"The evidence discloses that there is some dif- "ference in the chemical composition of sake and "still wine. This difference consists in the pres- "ence in one of a small percentage of certain "substances not found in the other. The flavor "of sake is somewhat different from that of "wine, although in both there is an alcoholic "taste. The evidence also shows that wine im- "proves with age, while sake deteriorates. The "best quality of sake will not keep for a longer "period than one year. Wine may be diluted "with water, without spoiling it, but water added "to sake will cause it to become flat, within a day "or two, and spoiled as a beverage. These are "some of the differences, in general character- "istics, which distinguish still wine from sake. "But on the other hand, in alcoholic strength, "there is great similarity between sake and still

"wines, and alcohol is the principal ingredient in "both sake and wine. In the particular importa- "tion, involved in this case, the percentage of "alcohol is 18 per cent, and the evidence shows "that in still wines the percentage of alcohol "ranges between eleven and sixteen per cent. It "thus appears that in alcoholic strength there "is great similitude between sake and some still "wines, and that in comparing one with the other "the difference between them arises from the dif- "ference between the other ingredients, which "constitute only a small percentage of their com- "position. The predominant substance in both "is alcohol, and in our opinion, notwithstanding "the difference in minor ingredients, there is, by "reason of the similarity in alcoholic strength, a "substantial similarity in the material which en- "ters into the composition of the two articles.

"We think there is also a similitude in use be- "tween sake and still wine, both being drank for "purposes of exhilaration, and both being cap- "able of producing intoxication; although intox- "ication from the use of sake passes off more "quickly, than that produced by wine.

"The conclusion, that there is a similarity be- "tween sake and still wine, in the material of "which they are compounded, is somewhat "strengthened by the facts, before referred to; "that in 1894, a claim was made by an importer "of sake, that it should be classed for duty as a "still wine, by similitude; the decision of the

"General Board of Appraisers upholding that "contention, and the long acquiescence, upon the "part of importers, in this classification. These "facts tend strongly to show that in the opinion "of merchants, interested in the question, the "classification thus fixed was correct; and in a "case like that before us, in which there is a con- "flict in the evidence, the facts referred to are "entitled to great weight.

"JUDGMENT REVERSED."

Endorsed: Filed May 18, 1908.
F. D. MONCKTON, Clerk.

6. Your petitioners are advised and believe that said decision and judgment of said United States Circuit Court of Appeals in the said case is erroneous, and that this Honorable Court should require the said case to be certified to it for its review and determination under and in conformity with the provisions of the sixth section of the Act of Congress entitled "An Act to "establish Circuit Courts of Appeals, and to de- "fine and regulate in certain cases the jurisdic- "tion of the courts of the United States, and for "other purposes," approved March 3, 1891.

7. And your petitioners further aver that the present case is one in which it is proper for this Court to issue a writ of certiorari, for the following reasons, among others:

(a) Because the questions involved herein have not been passed upon by this Court.

(b) Because the public interests and the interests of jurisprudence require the decision of this Court upon the questions involved herein.

(c) Because the interests of the Government as well as those of the importers, require the decision of this Court upon the questions involved herein.

(d) Because in view of the nature of the litigation and the large number of persons concerned, both here and abroad, and in view of the large amount involved, the questions herein are of sufficient general, national and material importance and interest to make it necessary that they should be determined by a Court of last resort. The present cause is one of large public importance because it involves great and growing commercial interests. The present cause is not one of solitary occurrence, nor of interest to your petitioners alone; upon its decision depends the rule to be applied to innumerable importations.

(e) Because there is, among the United States Courts and officials a conflict of judicial

and administrative opinion concerning the questions involved herein, which should be settled and determined by the Court of last resort. It is submitted that it is of the greatest importance that uncertainty should be removed from the law, that there should not be one rule in the Port of New York and a different rule in the Port of San Francisco, and that there should be complete harmony of rule and decision among the various Federal Courts and officials regarding the meaning of the provisions of the Tariff Act, and the mode in which those provisions shall be read and applied.

(f) Because of the reasons and considerations set forth in the brief herewith presented to this Court in support of this petition.

And your petitioners respectfully submit that the questions involved in and presented by the foregoing case of your petitioners should be authoritatively and finally adjudged by this Honorable Court, upon and after a full presentation to the Court of the merits of the said questions on the part of these petitioners and the United States.

Wherefore, your petitioners respectfully pray that a writ of certiorari may be issued out of and

under the seal of this Court directed to the United States Circuit Court of Appeals for the Ninth Circuit, commanding said Court to certify and send to this Court on a day certain to be therein designated, a full and complete transcript of the record and of all the proceedings of the said Circuit Court of Appeals in the said case therein, entitled, "The United States of Amer-"ica, Appellant, vs. Komada & Co., Appellees," and numbered 1361 in said Circuit Court of Appeals, to the end that the said case may be reviewed and determined by this Court as provided in and by Section 6 of the Act of Congress entitled, "An Act to establish Circuit Courts of Ap-"peals, and to define and regulate in certain "cases the jurisdiction of the Courts of the "United States, and for other purposes," approved March 3, 1891 and—or that your petitioners may have such other or further relief or remedy in the premises as to this Court may seem appropriate, and in conformity with the said Act.

And your petitioners further pray that said judgment of said United States Circuit Court of Appeals for the Ninth Circuit be reversed by this Honorable Court, and that the proper mandate of this Honorable Court be thereupon transmitted as by law provided to said United States

Circuit Court of Appeals for the Ninth Circuit.

And your petitioners will ever pray, etc.

Tavada & Co.
Petitioners.

THOMAS FITCH,
J. J. DUNNE,
Counsel for Petitioners.

United States of America,
Northern District of California, } ss.
City and County of San Francisco.

THOMAS FITCH being first duly sworn, deposes and says: I am one of the counsel for the petitioners above named, and as such have had personal charge of the above mentioned case in the United States Circuit Court in and for the Northern District of California in the Ninth Circuit, and also in the United States Circuit Court of Appeals for the Ninth Circuit. I know the contents of the foregoing petition. The facts therein stated are true to the best of my knowledge, information and belief.

Subscribed and sworn to before me this 17th day of June, A. D. 1908. Thomas Fitch

Seal U. S. Cir. Ct. Appeals.

Wm. H. Maxwell
Deputy Clerk, United States Circuit Court of Appeals for the Ninth Circuit.

CERTIFICATE OF COUNSEL.

United States of America,
Northern District of California, } ss.
City and County of San Francisco.

We, the undersigned, Counsel for the above named petitioners, do hereby certify that we have carefully examined the foregoing petition and application for a writ of certiorari, and that in our opinion the same is well founded, and that the case is one in which the prayer of said petitioners should be granted by this Honorable Court.

Dated, San Francisco, June 17th, A. D. 1908.

Thomas Ditch

J. D. Dennis

Counsel for Petitioners.

NOTICE OF MOTION.

To the United States of America, and to Hon. Charles J. Bonaparte, Attorney General of the United States, and to Hon. Robert T. Devlin, United States Attorney for the Northern District of California in the Ninth Circuit, Counsel for said United States of America:

Please take notice that on Monday, the ..... day of ~~June~~ October, A. D. 1908, at the opening of Court,

or as soon thereafter as the matter can be heard, we shall move the Supreme Court of the United States at the courtroom thereof in the City of Washington, D. C., that the foregoing petition for a writ of certiorari be granted.

Dated at San Francisco, this 17th day of June, A. D. 1908.

Thomas Fitch

J. J. Dunne

Counsel for Petitioners.

Due service of the foregoing verified Petition, Certificate of Counsel and Notice of Motion, and receipt of copies thereof, are hereby admitted, this 17th day of June, A. D. 1908.

Chas. J. Bonaparte, Atty. Genl. & H. M. Reynolds, Esq.

R. H. Devlin & Robt. T. Devlin, U. S. Atty

Counsel for the United States of America.

United States Supreme Court,

OCTOBER TERM, 1908.

KOMADA & COMPANY, Petitioners, vs. THE UNITED STATES OF AMERICA, Respondent.	No.

On application for a writ of certiorari to review a decision of the United States Circuit Court of Appeals for the Ninth Circuit.

Brief for Petitioners.

This is a petition for a writ of certiorari to bring up for review a decision of the United States Circuit Court of Appeals for the Ninth Circuit as to the dutiable classification under the Tariff Act of 1897 of a beverage known as sake. It was assessed with a duty of 50 cents per gallon when imported in tubs, and $1.60 a case when imported in bottles under paragraph 296 of the Tariff Act of July 24, 1897, providing for *still wine*.

It is not claimed by the Government that the article is in fact a wine. They contend that it is dutiable as wine by similitude, by virtue of the provisions of Section 7 of the Tariff Act.

The importers claim, and the Board of General Appraisers and the United States Circuit Court for the District of California have held, in the case at bar, that the article was dutiable at 20 per cent. as a non-enumerated manufactured article under Section 6 of the Tariff Act.

The United States Circuit Court of Appeals for the *Second* Circuit, in Nishimiya *vs.* U. S., 131 Fed. Rep., 650, has decided this question in favor of the *importer* and the *lower* duty, while the Circuit Court of Appeals for the *Ninth* Circuit has decided in the case of U. S. *vs.* Komada (162 Fed. Rep., 465) in favor of the *Government* and the *higher* duty.

REASONS WHY THE WRIT SHOULD BE ISSUED.

I.

The decisions of two Circuit Courts of Appeals are in conflict on the same question.

II.

The amount involved is many hundreds of thousands of dollars.

III.

The Circuit Court of Appeals reversed the decision of the Circuit Court and the Board of General Appraisers on questions of fact as to which the evidence was conflicting and where there was a great mass of evidence to sustain the findings of the Circuit Court and of the Board.

IV.

The decision of the Court of Appeals was based upon the conclusion of so-called experts as to similarity contrary to the decision of this Court in the case of Schmieder *vs.* Barney, 113 U. S., 645.

V.

The Circuit Court of Appeals held an article which is subjected to tax under the Internal Revenue Laws (R. S., 3339), as "beer, lager beer, porter, and other similar fermented liquors, to be dutiable as *wine* by similitude."

VI.

The Circuit Court of Appeals held a beverage made from the vegetable rice to be dutiable by similitude under a provision for wines which are made from grapes.

VII.

The Circuit Court of Appeals made an erroneous finding that there had been long and general acquiescence in the classification complained of.

PROVISIONS OF LAW INVOLVED.

Paragraph 296, Act of July 24, 1897:

"Still wines, including ginger wine or ginger cordial and vermuth, in casks or packages

other than bottles or jugs, if containing 14 per centum or less of absolute alcohol, 40 cents per gallon; if containing more than 14 per centum of absolute alcohol, 50 cents per gallon. In bottles or jugs, per case of one dozen bottles or jugs, containing each not more than one quart and more than one pint, or 24 bottles or jugs containing each not more than one pint, one dollar and sixty cents per case. * * * Provided, That any wines, ginger cordial, or vermuth, imported containing more than 24 per centum of alcohol shall be classed as spirits and pay duty accordingly."

Paragraph 297, Act of July 24, 1897:

"Ale, porter and beer, in bottles or jugs, forty cents per gallon, * * * otherwise than in bottles or jugs, twenty cents per gallon."

Section 6: "That there shall be levied, collected and paid on the importation of all raw or unmanufactured articles, not enumerated or provided for in this Act, a duty of ten per centum *ad valorem*, and on all articles manufactured, in whole or in part, not provided for in this Act, a duty of twenty per centum *ad valorem*."

Section 7: "That each and every imported article, not enumerated in this Act, which is similar, either in material, quality, texture or the use to which it may be applied to any article enumerated in this Act as chargeable with duty, shall pay the same rate of duty which is levied on the enumerated article which it most resembles in any of the particulars before mentioned; and if any non-enumerated article equally resembles two or more enumerated articles on which different rates of duty are chargeable, there shall be levied on such non-enumerated article the same rate of duty as is chargeable on the article which it resembles paying the highest rate of duty."

Statement of the Case.

On November 25, 1904, petitioners imported from Japan and entered at the Port of San Francisco, two hundred cases and five hundred and sixty-four tubs of the merchandise in question, a beverage invoiced and known as "sake," (Record p. 10).

The merchandise was classified as still wine, and a duty of $1.60 a case assessed upon the sake in bottles and 50 cents a gallon on the sake imported in tubs, under paragraph 296 of the Tariff Act of July 24, 1897 (Record, p. 10).

The importer duly protested, claiming, *inter alia*, that the merchandise was dutiable at 20 cents per gallon in bulk, and 40 cents per gallon in bottles, under paragraph 297 and Section 7 of the same act, or at 20 per cent. *ad valorem* under Section 6 of the same act.

The Board of General Appraisers, on October 26, 1905, after taking evidence in the case, rendered a decision holding the sake dutiable at 20 per cent. as an article manufactured in whole or in part not provided for under Section 6 of the Tariff Act (Record, p. 12). Their decision (G. A. 6,182, T. D. 26,810) appears on pages 7 and 8 of the Record.

The collector appealed from the decision of the Board to the United States Circuit Court for the District of California. That Court affirmed the decision of the Board. The opinion of Judge Morrow will be found in the Record, pages 234 to 237. The findings of the Court will be found on pages 9 to 14 of the Record. The collector appealed to the Circuit Court of Appeals, which reversed the decision of the Circuit Court and of the Board, and affirmed the action of the collector. The decision of the Court will be found in the Record, pages 5 & 13 Addenda It is also reported in 162 Fed. Rep., page 465.

The article in question (sake) is a beverage; a product of the fermentation of rice produced by a process similar to that in making beer—rice being

used instead of barley. An analysis of a sample shows its composition to be as follows:

Absolute alcohol by distillation (by volume).	17.05
Residual unfermented extract	3.60
Total acidity estimated as lactic acid	0.39
Residual sugars unfermented (estimated as maltose)	1.929
Ash	0.058
Albuminoids	0.018
Glycerine	1.14

Polariscopic and other tests disclosed the presence of maltose, which is the first product of the change of starch under the action of diastic ferments, and indicates that the fluid was the product of a starch-bearing substance.

Sake is amber colored, has a sweet taste, has no bead and is always heated before being drunk (see stipulation, Record, p. 19, and decision of the Circuit Court of Appeals for the Second Circuit in U. S. *vs.* Nishimiya, 137 Fed. Rep., 396).

There are manufactories of sake in California which are sometimes called "Sake Breweries," and they are required to pay the same tax as manufacturers of malt liquors, $50 a year and a dollar per barrel on their product, being the same as the Internal Revenue tax on beer, ales and porter (Record, p. 20, R. S., 3339).

History of the Issue.

Prior to 1894 sake was classified by the Collector at New York as distilled liquor.

In 1894 the protest of Y. Woozens, claiming *only* that sake was dutiable at 50 cents per gallon as a still wine by similitude, was sustained, and the classification changed by the Board of General Appraisers (T. D. 15,392, G. A. 2,786). This classification continued without protest until March, 1902, when H. Hackfeld & Company, of Honolulu, duly protested against such classification and

aimed that sake was not properly dutiable as a still wine under paragraph 296 of the Tariff Act of 1897 as assessed, but was properly dutiable under paragraph 297 as ale, porter or beer at the rate of 40 cents per gallon if in bottles or in jugs, or at 20 cents per gallon if otherwise than in bottles or in jugs, or under Section 6 at the rate of 20 per cent. ad valorem as a non-enumerated manufactured article, the said claims being severally and alternatively made under the paragraphs or sections referred to either directly or by similitude under Section 7 of the said Act.

The Board of General Appraisers in April, 1903, overruled the Hackfeld protest (T. D. 24,410, G. A. 5334) and held the article dutiable as still wine by similitude.

No appeal was taken by Hackfeld & Company, whose counsel elected to submit a protest by one Nishimiya lodged at New York which related to the same article and made the same claim. The Board of Appraisers made the same decision as it had in Hackfeld's case, and appeal was taken to the United States Circuit Court for the Southern District of New York. That court reversed the Board of General Appraisers and held the merchandise dutiable at 20 per cent. as a non-enumerated manufactured article under Section 6 (Nishimiya *vs.* U. S., 131 Fed. Rep., 650). The Government appealed from this decision to the Circuit Court of Appeals, which rendered its decision on March 3d, 1905, affirming the decision of the Circuit Court (U. S. *vs.* Nishimiya, 137 F. R., 396).

These decisions appear in the Record, pp. 29 to 30. The Government did not apply to this Court for a writ of *certiorari* in the Nishimiya case, neither would it acquiesce in it. It took up a new case (the present one) arising in California which, as has been already shown, was decided in favor of the importer by the Board of General Appraisers and the United States Circuit Court, but their decisions were reversed by the Circuit Court of Appeals. More than

three and a half years have elapsed since this issue was decided by the Circuit Court of Appeals for the Second Circuit in favor of the importers' contention and nearly six and a half years since Hackfeld's protest was filed in 1902.

ARGUMENT.

I.

A writ of *certiorari* should be issued in this case, if for no other reason, because the decisions of Circuit Courts of Appeal in two different circuits are in conflict.

It would seem that no stronger ground could be assigned for invoking the power of this Court to issue writs of *certiorari* than the fact that two Circuit Courts of Appeals have made decisions on the same question which cannot be reconciled, but are in direct conflict. This would be true even where the litigations were between private parties, and did not involve questions of general interest, or the public policy of the Government, but when we come to deal with the Revenue laws of the country and the collection of Customs duties the necessity for such action by this Court is imperative. The Customs Laws should be interpreted and enforced uniformly throughout the United States. The same rate of duty should be collected and retained by the Government in all parts of the country. In the present situation the Government may collect the duty provided for still wines on sake imported in all parts of the country, but the Court of Appeals in California says it may keep it, and the Court of Appeals at New York says it must refund all in excess of 20 per cent. There is no reason to suppose that the Circuit

Court of Appeals for the Second Circuit will recede from its position because the Circuit Court of Appeals for the Ninth Circuit has taken this position. Experience has shown the necessity in such cases of a decision by this court, to which all inferior tribunals shall bow.

Under the present tariff act a controversy arose as to whether beads temporarily strung were dutiable as beads strung or as beads loose, unthreaded or unstrung. The United States Circuit Court of Appeals for the Second Circuit had decided (*in re* Steiner, 79 F. R., 1003) as to similar provisions under a previous act that such beads were dutiable as beads strung. The Circuit Court of Appeals for the Seventh Circuit decided (U. S *vs.* Buettener, 133 F. R., 163) that such beads were dutiable as beads not threaded or strung. A new case was then brought to the Circuit Court of Appeals for the Second Circuit and they were asked to recede from their former decision, because the record in the Chicago case was more complete and voluminous than in the first New York case. Speaking of this suggestion the Circuit Court of Appeals for the Second Circuit said:

> "No new facts and no new arguments are presented which would require a different decision in this cause. Reference is made to a decision of the Circuit Court of Appeals in the Seventh Circuit (U. S. *vs.* Buettener, 133 Fed. Rep., 163, 66 C. C. A., 289) where the facts were apparently the same, but the conclusion reached different from that in the Steiner Case; and it is suggested that, in order to secure an harmonious interpretation of the tariff act, we should reverse our former decision, and follow the Court in the Seventh Circuit. Inasmuch, however, as the decision of this court was first in order of time, that argument might more properly have been addressed to the Seventh Circuit. Since we are not persuaded by the later decision that we were in error in our first conclusion, the better course would seem to be to adhere to our former ruling, *leaving it to the Supreme*

Court to secure uniformity by determining which of the conflicting constructions of the paragraph is the correct one."

Frankenburg Co. *vs.* U. S., 146 F. R., 63 at p. 64.

Thereupon an application was made to this Court for a writ of *certiorari*, which was granted, and this Court adopted the position taken by the Circuit Court of Appeals for the Second Circuit and settled the issue.

Frankenburg Co. *vs.* U. S., 206 U. S., 224.

A similar conflict between the Circuit Court of Appeals for the Second and Ninth Circuits arose under the tariff act of 1890 as to the classification of tapioca flour, and whether or not it was a preparation fit for use as starch. The Circuit Court of Appeals for the Second Circuit decided that the article was not dutiable under the starch paragraph (Townsend *vs.* U. S., 56 F. R., 222), and the Circuit Court of Appeals for the Ninth Circuit decided that the article was dutiable under the starch paragraph (Chew Hing Lung *vs.* Wise, 83 F. R., 162). Thereupon a writ of *certiorari* was issued out of this court, and it was recited in the opinion of Mr. Justice Peckham (Chew Hing Lung *vs.* Wise, 176 U. S., 156, at page 157,) that "*Upon application by the importers, this Court granted a writ of certiorari, it being alleged that there were inconsistent decisions in the Circuit Courts of Appeals on this question.*" Again this Court sustained the Circuit Court of Appeals for the Second Circuit.

The mischiefs that may arise when conflicts between Circuit Courts of Appeals are not settled by an authoritative decision of this court is illustrated in cases involving the question whether an importer may have his goods held dutiable under a certain provision in the tariff law by virtue of the similitude clause, when he has not referred to the simili-

tude clause in the protest which he filed. In Hahn *vs.* Erhardt, 78 Fed. Rep., 620, it was held by the Circuit Court of Appeals for the Second Circuit that the similitude clause must be referred to in the protest. In Guggenheim Smelting Co., 112 Fed. Rep., 516, it was held by the Circuit Court of Appeals for the Third Circuit, that the similitude clause need not be referred to in the protest. In the latter case an application was made to this court for a writ of *certiorari* and denied. Subsequently the Board of General Appraisers reviewing this situation, called attention to the fact that the Attorney General in his application to this court for a writ of *certiorari* in the Guggenheim case had especially raised the question of the sufficiency of the protest, decided that the refusal of this court to issue a writ implied an approval of the decision of the Circuit Court of Appeals for the Third Circuit, and therefore held that the similitude section need not be referred to in the protest.

When a case involving this question was taken to the Circuit Court of Appeals for the Second Circuit, that Court *refused to recede from its ruling* on the question and reversed the decision of the Board (U. S. *vs.* Dearberg Bros., 143 Fed. Rep., 472). *The question is still unsettled.*

Some decisions of the Board of General Appraisers emphasize the difficulties surrounding the interpretation of the Tariff when courts of appeals differ. In U. S. *vs.* Roesseler & Hasslacher Chemical Co., 137 F. R., 770, the Circuit Court of Appeals for the Second Circuit held a certain class of merchandise not to be dutiable as metals unwrought. In Thomas *vs.* William Cramp & Sons Ship & Engine Bldg. Co., 142 Fed. Rep., 734, the Circuit Court of Appeals for the Third Circuit held similar substances to be dutiable as metals unwrought. Subsequently a protest relating to this subject came before the Board of General Appraisers on an importation made at the Port of Philadelphia. In its decision

(T. D. 28,948, G. A. 6,755) the Board of General Appraisers said:

> "The issue is the subject of conflicting rulings of the Appellate Courts for the Second and Third Circuits. * * * We are compelled to disregard the Roesseler decision as a factor in determining the case at bar; and *in following the rulings of the highest Court in the jurisdiction in which these protests arise*, we must of necessity overrule the protests."

Again in deciding the question whether certain tea canisters were or were not unusual coverings subject to additional duty under Section 19 of the Customs Administrative Act, the Board of Appraisers made one ruling as to canisters imported at San Francisco, and another as to canisters imported at Chicago, and comparing a decision of the Circuit Court for the Northern District of Illinois with a decision of the Circuit Court for the Northern District of California said of these decisions:

> "We may add that we have found it difficult to completely harmonize the views of the Courts in the two circuits, and *it is possible that the decisions are in conflict with each other.*"

It may be suggested, in answer to the foregoing, as it has been insisted on behalf of the United States in the Court below, that the record in the case at bar is more full and voluminous than the record in the Nishimiya case decided by the Circuit Court of Appeals for the Second Circuit. The answer to this suggestion is that the Board of General Appraisers found in this case (Record, p. 8):

> "We should not feel warranted in holding that the present case is sufficiently differentiated from the Nishimiya case to authorize a departure from the rulings of the Courts."

The Circuit Court found (Record, p. 237) in its opinion that "*all the elements of difference found in*

that case (the Nishimiya case) have been established in this case. There is more evidence on both sides in the present case than there was in the Nishimiya case, but *I do not find that it has any more weight in establishing a similitude to either wine or beer. The general case presented seems to me to be substantially the same.*"

If the Government thought it could make a new record on which to claim a different ruling from that in the Nishimiya case, it should have proceeded in the same circuit. *The practice of attempting to secure conflicting decisions of the Circuit Courts of Appeals is not one to be encouraged.*

It is respectfully insisted that the dutiable classification of sake under the present tariff act cannot be authoritatively settled and a uniform rule to govern the courts in the disposition of protests pending at Honolulu, San Francisco, New York and other places, unless the question is brought to this court by a writ of certiorari and settled finally.

II.

The amount in controversy upon this issue is very large.

Petitioners have not access to Government statistics so as to state the precise amount involved in this controversy. But in the brief filed by the Government in the United States Circuit Court of Appeals last spring, it was stated by counsel for the Government that the duties claimed to have been exacted in excess on this class of merchandise amounted then to a million and a half of dollars, and would amount to $250,000 a year. Assuming these figures to be approximately correct, as the Nishimiya case was decided by the United States Circuit Court of Appeals for the Second Circuit in March, 1905, *there has been collected since that de-*

cision was made in favor of the importers, $875,000 contrary to the law as laid down in the decision, and if the decisions of these two Circuit Courts of Appeals remain in conflict without the interposition of this Court, it is hard to say how long this condition of affairs will continue.

III.

The Circuit Court of Appeals reversed the Board of General Appraisers and the Circuit Court upon questions of fact as to which the evidence was conflicting and there was a large body of evidence to sustain the findings of the board and of the Circuit Court, and this was manifest error.

The question whether "sake" was similar to still wines in the particulars mentioned in the statute was a question of fact, as has been repeatedly decided.

Indeed, the Court of Appeals conceded this in its opinion when it said: "The question whether a non-enumerated article is similar to one named in the Tariff Act, and for that reason subject to a like duty is one of fact." Both the Board of General Appraisers and the Circuit Court had found this question of fact in favor of the importer. In the Nishimiya case, the Circuit Court of Appeals at New York had said:

> "Sake has so many characteristics which are not found in either beer or wine; its ingredients are so unusual and the process of manufacture so unique that it may fairly be held that it is nowhere described except by the general language of Section 6."

The Board of General Appraisers had found (in this case):

> "We should not feel waranted in holding that the present case is sufficiently differentiated from the Nishimiya case to authorize a departure from the rulings of the court."

The Circuit Court found in this case, (Record, p. 236, bottom):

> "In some of these elements I have mentioned, 'sake' resembles beer more than it does wine, but in final comparison in material, quality and use, a substantial resemblance to either wine or beer disappears."

The Circuit Court of Appeals in U. S. *v.* Komada, 162 F. R., 467, bases its refusal to follow the Nishimiya case upon the statement that

> "in the present case the Court has before it additional evidence not before the Board of General Appraisers, and the record is much more full and complete than that before the Circuit Court of the Southern District of New York and the Circuit Court of Appeals for the Second Circuit in the case of U. S. *v.* Nishimiya, above referred to. We must therefore determine the question of similitude here presented without aid from the ordinary presumption which would otherwise attach to the finding of the Board of General Appraisers, and the very great weight to which the decision of the courts, just mentioned, in the case of U. S. *v.* Nishimiya, would be entitled if the record now before us was the same as that submitted to those courts in that case,"

but it ignores the fact that *all the evidence before it was before the Circuit Court and passed upon by that Court.*

It has long been the settled rule of this Court, and the same rule should prevail in the Circuit Courts of Appeals, not to reverse decisions of the lower courts on questions of fact unless there is no evidence to sustain them or they are clearly against the over-

whelming weight of evidence. No one will pretend that such is the case here. Besides the evidence which had been put in the Hackfeld and Nishimiya cases, the importers had put in the testimony of thirteen witnesses before the Board of General Appraisers, and the Government had put in the testimony of thirteen witnesses, and when the case was removed by petition into the Circuit Court, the importers put in the testimony of nineteen witnesses and the Government the testimony of twenty-four. There never was a clearer case of a conflict of testimony upon which a tribunal authorized to find facts had based a finding.

Circuit Courts of Appeals should not reverse the decisions of Circuit or District Courts on questions of fact where there is a conflict of evidence.

Dooley *vs.* Pease, 88 Fed. Rep., 446; 180 U. S., 126.

Wolff *vs.* Wells Fargo Co., 115 Fed. Rep., 32.

Eli Mining & Laird Co. *vs.* Carleton, 108 Fed. Rep., 24.

American Sales Book Co. *vs.* Bullivant, 117 F. R., 255.

Gorham Mfg. Co. *vs.* Emery-Bird-Thayer Dry Goods Co., 104 Fed. Rep., 243.

Lillenthal *vs.* McCormick, 117 Fed. Rep., 89.

Gaffner *vs.* Pigott, 116 Fed. Rep., 486.

Eureka Co. Bank *vs.* Clarke, 130 Fed. Rep., 325.

The Gladestry, 128 Fed. Rep., 591.

American Bridge Co. of New York *vs.* Camden Interstate Railroad Co., 135 Fed. Rep., 323.

In re Antigo Screen Door Co., 123 Fed. Rep., 249.

West Virginia Northern Railroad Co. *vs.* U. S., 134 F. R., 198.

Moore *vs.* Moore, 121 Fed. Rep., 737.

Dodge *vs.* Norlin, 133 Fed. Rep., 363.
Lopez *vs.* Collier, 129 Fed. Rep., 104.
Burns *vs.* Burns, 131 Fed. Rep., 238.
Last Chance Mining Co. *vs.* Bunker Hill & S. Mining & Concentrating Co., 131 Fed. Rep., 579.
Buckingham *vs.* Estes, 128 Fed. Rep., 584.
McKinley Creek Mining Co. *v.* Alaska United Mining Co., 183 U. S., 563.

More specifically this Court has laid down the principle that where there are two inferior tribunals which have passed upon the facts, this Court will not review them, and in that sense the Board of General Appraisers is such a tribunal.

The *Carib Prince*, 170 U. S., 655.
Brainard *vs.* Buck, 184 U. S., 99.
Stuart *vs.* Hayden, 169 U. S., 1.
Furrer *vs.* Ferris, 145 U. S., 132.
Workman *vs.* N. Y. City, 179 U. S., 552.
Sena *vs.* U. S., 189 U. S., 233.
The *Wildcroft*, 201 U. S., 378.

IV.

The decision of the Court of Appeals was based upon the conclusion of so-called experts as to similarity contrary to the decision of this Court in Schmieder v. Barney, 113 U. S., 645.

The sole reason given by the Circuit Court of Appeals for not following the decision of the Board of General Appraisers and of the Circuit Court in this case, and of the United States Circuit Court of Ap-

peals in the case of U. S. *v.* Nishimiya was that "The Court has before it additional evidence not before the Board of General Appraisers and the record is much more full and complete than that before the Circuit Court for the Southern District of New York and the Circuit Court of Appeals for the Second Circuit in the case of Nishimiya, above referred to.

When this additional evidence is examined it will be found to consist of the testimony of wine merchants, chemists, employees of the Government and the Department of Agriculture, &c., that it was their opinion that this article tasted like wine, &c. It was of such evidence as this that this Court said in Schmieder *vs.* Barney (*supra*):

> "The effort was to put the opinion of commercial experts in the place of that of the jury upon a question which was as well understood by the community at large as by merchants and importers. This, it was decided in Greenleaf *v.* Goodrich, could not be done."

In the Schmieder and Greenleaf cases, dry goods merchants had been asked whether in their opinion certain dress fabrics imported by the plaintiffs were of the same description to goods known as "delaines." See also Cadwalader *v.* Zeh, 151 U. S., 171, at the foot of page 177.

V.

Sake manufactured in California is taxed under the Internal Revenue laws as a beer, while in this case the Court of Appeals has held the article when imported dutiable as a wine.

Section 3339, U. S. Revised Statutes, provides:

> "There shall be paid on all beer, lager beer, ale, porter and other similar fermented liquors,

> brewed or manufactured and sold and removed for consumption or sale within the United States by whatever name such liquors may be called, a tax of $1.00 for every barrel containing not more than thirty-one gallons.'

It is conceded by stipulation in the Record (p. 20):

> "There are manufactories of sake in California which are sometimes called sake breweries and they are required to pay the same tax as manufacturers of malt liquors, $50 per year and $1 per barrel on their product, being the same as the Internal Revenue tax on beer, ales and porter. They receive the same license from the Internal Revenue Department as beer brewers."

It should be noted that in the Court of Appeals the Government claimed that brewers of sake had to pay the tax above referred to because they used a substitute for malt.

There is no Internal Revenue tax on wine. In order to collect a tax on sake manufactured here, the Government classifies it as beer, ale, porter or similar fermented liquors, but when the same article is imported it is not satisfied to classify the article as similar to beer, ale or porter, but insists upon classifying it as similar to wine so that it may collect a little higher tax upon it. This inconsistency in practice is persuasive of the fact that the article is not sufficiently similar to either beer or wine to be classified as either, and that it is a non-enumerated article.

VI.

The Circuit Court of Appeals held a beverage made from the vegetable rice to be dutiable by similitude under a provision for wines which are made from grapes.

The similitude law was intended to apply to articles not known or in use at the time of the passage of a Tariff Act, and not to articles well known and in use when the Tariff Act was passed. Its purpose has been described by this Court in the leading case of Stuart *vs.* Maxwell, 16 How., page 150, as follows:

> "It was designed to afford rules to guide those employed in the collection of the revenue, in certain cases likely to occur, not within the letter, but within the real intent and meaning of the laws imposing duties, and thus to prevent evasions of those laws. Manufacturing ingenuity and skill have become very great; and diversities may be expected to be made in fabrics adapted to the same uses and designed to take the same places as those specifically described by some distinctive marks, for the mere purpose of escaping from the duty imposed thereon. And it would probably be impossible for Congress by legislation to keep pace with the results of these efforts of interested ingenuity. To obviate, in part at least, the necessity of attempting to do so, this section was enacted."

Again on page 162, the Court says:

> "Suppose an article is designedly made to serve the uses and take the place of some article described, but some trifling and colorable change is made in the fabric or some of its incidents. *It is new in the market. No man can say he has ever seen it before*, or *known it under any commercial name.* But it is substantially like a known article which

> is provided for. The Law of 1842 then declares that it is to be deemed the same, and to be charged accordingly; that the Act of 1846 has provided for it under the name of what it resembles."

The similitude law provides specifically for resemblance in material. It is respectfully submitted that the word "material" in this law means the substance or material out of or from which an article is made. There is no resemblance or similarity between rice and grapes which would justify a ruling that sake resembled wines in material. In its brief in the Court of Appeals, the Government sought to claim a similarity in material by chemical analysis and comparing the percentages in sake and in a certain low grade of sherry wine, of alcoholic strength, extractive matters, ash, acetic acid, lactic acid, glycerine, maltose and dextrose, nitrogenous matters and a trace of sulphuric acid. It cannot be that Congress intended that Collectors, in passing on the classification of merchandise, should resort to such tests as these for comparison of articles of food.

With reference to alcoholic strength, it should be observed that both in the wines and sake, alcohol is the result of fermentation in the process of manufacture, and does not consist of alcohol put into the beverage as such.

So far as quality is concerned, in order to lay a basis for the claim that sake resembled wine in quality, it was necessary for the Government to make a special importation of a very inferior quality of sherry not shown to have ever been imported into the United States, except for the purposes of this case (Rec., p. 17). This is not a proper test of similitude. Articles should not be held dutiable as wine by similitude, unless they resemble wines generally, and not some unusual kind of wine not even known in the United States.

In Hermann *vs.* Arthur, 127 U. S., 363, this Court reversed the Circuit Court because the Court had not left similitude as a question of fact to the jury

and because the plaintiff's goods of "Inferior value and material were compared with costly mohair goods."

Similitude in use is claimed by the Government because sake is taken as a beverage at meals and is capable of producing intoxication. If these criteria could determine similitude water might be held similar to champagne or benedictine to Rhine wine.

How far the Government had to go in searching for similitude is illustrated by the fact that they seriously claim that sake is similar to sherry because of a resemblance in color, effervescence, and the amount taken as a drink.

The enumeration, after the words still wines, in paragraph 296 of ginger wine and vermuth, is significant. If Congress intended beverages to pay duty by similitude as still wines this enumeration was unnecessary.

The Circuit Court of Appeals erroneously based its decision upon the suggestion that there had been a long acquiescence by importers in the classification of sake as still wine by similitude.

It appeared that in October, 1894, the Board of Appraisers decided on a protest of one Woozens, that sake was not dutiable as a spirituous beverage, and sustained the *only claim made in Woozens protest* that sake was dutiable as a still wine by similitude. No further protest having been apparently filed until early in 1902, it is claimed that importers had acquiesced in this classification for a period of eight years. It would seem that this proposition was sufficiently answered by the following quotation from the Government's brief in the Court of Appeals (p. 78):

> "At the time the Act became a law in 1897, Hawaii was not a part of the United

States, and *sake had been imported into the country in quantities so small* that a special provision for it did not seem necessary."

There was no proof before the Court of Appeals as to what, if any, sake had been imported into the United States between 1894 and 1902. There may have been none, or, if as suggested by the Government counsel, the quantity was so small, it might not have been worth while for any importer to assume the burden and expense *of such a litigation as has been necessary in the case at bar.* The Customs Laws of the United States were not applied to Hawaii until April, 1904. It was only then as practically conceded by the Government in the paragraph of its brief above quoted that sake began to be imported into the United States so as to be covered by the provisions of the present tariff act in sufficiently large quantities to make the question one of importance and yet [redacted] had begun about December 1st 1903. It is idle to contend that there was any acquiescence in the classification of this article as a still wine such as would justify invoking the principle of statutory construction referred to by the Circuit Court of Appeals in this case.

Studebaker *vs.* Perry, 184 U. S., 258.

For the foregoing reasons the petition should be granted and the writ of certiorari issued.

Dated Washington, November 9th, 1908.

J. M. THURSTON,
W. WICKHAM SMITH,
STANLEY JACKSON,
THOMAS FITCH,
J. J. DUNNE,
Counsel for Petitioners.

Hackfeld's protest related to an importation on the 9th of Apr, 1902 (Rec.p.20) and Nishimiya's to an importation of Dec 26, 1902 (Rec.p.23)

Supreme Court, U. S.
FILED
NOV 14 1906
JAMES H. MCKENNEY,
Clerk

No. 230.

In the Supreme Court of the United States.

OCTOBER TERM, 1906.

KOMADA & COMPANY, PETITIONERS,

vs.

THE UNITED STATES.

ON PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF FOR THE UNITED STATES IN OPPOSITION.

In the Supreme Court of the United States.

OCTOBER TERM, 1908.

KOMADA & COMPANY, PETITIONERS,
v.
THE UNITED STATES.
No. 488.

ON PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF FOR THE UNITED STATES IN OPPOSITION.

This case involves the classification for tariff purposes of sake, a beverage made in Japan, containing 18 per cent of alcohol (R., 19) with an invoice value of about fifty (50) cents per gallon. Petitioners primarily and stoutly maintain that it is a non-enumerated manufactured article dutiable at 20 per cent ad valorem—ten (10) cents per gallon—under the following provision, tariff act 1897 (30 Stat., 205):

> SEC. 6. That there shall be levied, collected, and paid on the importation of all raw or unmanufactured articles, not enumerated or provided for in this act, a duty of ten per centum ad valorem, and on all articles manufactured, in whole or in part, not provided for in this act, a duty of twenty per centum ad valorem.

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In a mild and secondary way—not sufficiently important for extended comment here—they suggest that it may be dutiable at twenty (20) cents per gallon by reason of similitude to articles enumerated in the following paragraph:

> Par. 297. Ale, porter, and beer, in bottles or jugs, forty (40) cents per gallon, but no separate or additional duty shall be assessed on the bottles or jugs; otherwise than in bottles or jugs, twenty (20) cents per gallon.

Six gallons of sake, which petitioners claim should pay a total duty of sixty (60) cents, contain more than one gallon of absolute alcohol. Alcohol is dutiable at approximately $2.25 per proof gallon (act 1897, pars. 2, 67, 263, 289, 291, 292, 293, 296, 299; 30 Stat., 205); and sundry provisions of the statute show a well-defined purpose to fix rates upon articles according to the amount of alcohol therein. It would be rather extraordinary if an importer by paying sixty (60) cents could bring in a gallon of alcohol because contained in sake, when he could not import that amount in any other form without paying $2.25 or more.

Still wines with more than 14 per cent and not more than 24 per cent of absolute alcohol are dutiable at fifty (50) cents per gallon under the following provision, act of 1897 (30 Stat., p. 174):

> Par. 296. Still wines, including ginger wine or ginger cordial and vermuth, in casks or packages other than bottles or jugs, if containing fourteen per centum or less of

> absolute alcohol, forty cents per gallon; if containing more than fourteen per centum of absolute alcohol, fifty cents per gallon. * * *

The Government maintains that sake, by reason of its similitude to still wine, is subject to the same duty imposed upon the latter under the following provision, act of 1897 (30 Stat., p. 205):

> SEC. 7. That each and every imported article, not enumerated in this act, which is similar, either in material, quality, texture, or the use to which it may be applied, to any article enumerated in this act as chargeable with duty, shall pay the same rate of duty which is levied on the enumerated article which it most resembles in any of the particulars before mentioned; and if any nonenumerated article equally resembles two or more enumerated articles on which different rates of duty are chargeable, there shall be levied on such nonenumerated article the same rate of duty as is chargeable on the article which it resembles, paying the highest rate of duty; * * *

The similitude clause, long a part of general tariff legislation, has been construed by this court. "It was designed to afford rules to guide those employed in the collection of the revenue, in certain cases likely to occur, not within the letter, but within the real intent and meaning of the laws imposing duties, and thus to prevent evasions of those laws." (*Stuart* v. *Maxwell,* 16 How., 150, 160.) "If an article is found not enumerated in the

tariff laws, then the first inquiry is whether it 'bears a similitude, either in material, quality, texture, or use to which it may be applied, to any article enumerated * * * as chargeable with duty.' If it does, and the similitude is substantial, then, in the language of the court in *Stuart* v. *Maxwell, supra,* 'it is to be deemed the same, and to be charged accordingly.' In other words, although not specifically enumerated, it is provided for under the name of the article it most resembles." (*Arthur* v. *Fox,* 108 U. S., 125, 128.)

The question in dispute in the present cause was one of *fact*—not law. Is sake similar to a still wine "either in material, quality, texture, or use to which it may be applied?"

An outline of the tariff history of the beverage will materially aid in reaching a right conclusion.

Sake is drunk by Japanese. Before the annexation of the Hawaiian Islands not many of that race were in the United States, and the importation was not large; but for many years very considerable quantities have been imported into those islands from Japan.

Prior to 1894 sake was classified as a distilled liquor and subjected to a duty of $2.50 per proof gallon under paragraph 329, act 1890, and $2 per proof gallon under paragraph 311, act 1883. (R., 19.)

In 1894 the protest of an importer who claimed sake was dutiable under the act of 1890 by reason

of its similitude to still wine was sustained by the Board of General Appraisers (T. D., 15932, G. A., 2786, October 4, 1894), and that classification was accepted by the Treasury Department and has been continued until the present. No protest against it was entered until 1902.

During the period when sake was classified by similitude to still wine, and, of course, with full knowledge of this, Congress passed the tariff act of 1897, which in no way modified the pertinent provisions of the earlier act under which the ruling was made.

In March, 1902, Hackfeld & Co. protested against the long-established classification, claiming that sake was not similar to still wine. This was overruled by the Board of General Appraisers and no appeal taken. (R., 20.)

Subsequently Nishimiya entered a similar protest on an insignificant importation at New York, which was likewise overruled by the board. (R., 23.) The large importance of the question apparently was not promptly appreciated by the Government representatives probably because of the trifling total quantity of the liquor imported at that port. Appeal was taken to the Circuit Court, Southern District of New York, which reversed that ruling and held sake was a nonenumerated manufactured article under section 6, dutiable at 20 per cent ad valorem. (R., 25.) The Circuit Court of Appeals, Second Circuit, opinion by Coxe, J., affirmed the

action of the Circuit Court (R., 26), but criticised the record as "very meager as to the points of similarity between it (sake) and the other beverages with which it is compared; many of the characteristics of wine and beer being untouched by the proof." (R., 29.) That court also found "sake resembles beer in its process of manufacture and in the presence of maltose in the extract, which is a characteristic of beer, but is never found in still wines. It resembles still wines in the large percentage of alcohol, and has may points of similarity to both wines and beer." (R., 29.) Notwithstanding such finding it was adjudged that sake was improperly classified by reason of similitude to still wines!

All the evidence introduced in the Nishimiya case is a part of the present record, and is set out therein at pages 30 to 42. Its meagerness is apparent. The inconsequence of the conclusion reached likewise seems apparent.

The Government declined to accept the Nishimiya case as a test one—the record being entirely inadequate—and to treat the decision as finally determinative of the classification of sake; and to secure an adjudication upon a record full and complete the present case, bottomed on a protest entered at San Francisco, was made up. A large amount of evidence was taken and the points involved fully elucidated. The Board of General Appraisers feeling bound by the opinion of the court at New

York in the Nishimiya case followed it and expressed no independent judgment. (R., 7, 8.)

The Circuit Court at San Francisco "at the conclusion of the oral argument * * * announced that as the cause would be properly heard *de novo* upon appeal, it would follow the decision of the Circuit Court of Appeals in New York in *United States* v. *Nishimiya*, 137 Fed., 396, and act *pro forma;* and without further examination of the record, affirmed the action of the Board." (R., 8.)

The Government appealed to the Circuit Court of Appeals and presented there a full, carefully prepared record with actual samples of the various liquids necessary to an accurate understanding of the matter. (R., 17.) That court, after examining the whole subject, including the samples, sustained the Government's contention, reversed the judgment of the Circuit Court, and decreed that sake should be classified by reason of similitude to still wine and subjected to a duty of fifty (50) cents per gallon. (162 Fed. Rep., 465.)

The present proceeding is an effort by importers to secure review of this last judgment.

It appears that after considering a record full and complete and inspecting the samples of sake and wines, the Circuit Court of Appeals, Ninth Circuit, has authoritatively classified sake, and that its action is in entire agreement with the two con-

clusions of the Board of General Appraisers based upon its independent consideration. (R., 19–20.)

It also appears that the judgment of that court is in harmony with the practical construction adopted in 1894 and since continuously acted upon, and which in effect was adopted by Congress when the act of 1897 was passed.

An examination of the record itself—an essential part of which is the samples of liquids (Exhibits, R., 17)—it is respectfully submitted, will show that a correct result was reached. (If the exhibits mentioned in the Record, page 17, are not now before this court, the question of fact involved can not be properly considered. The liquids themselves best show the similitude.)

There seems no reason for allowing the writ unless it should be granted upon the sole ground that the Circuit Court of Appeals for the Second Circuit in a case presented upon a record declared to be meager and certainly inadequate, reached a different finding of *fact* and therefore adopted a different classification from that adjudged by the Circuit Court of Appeals for the Ninth Circuit upon an admittedly full and carefully prepared record.

This apparent conflict between decisions does not constitute sufficient reason for reexamination. The conflict is not between conclusions as to law, and the finding of fact in the Second Circuit was upon a record which the court itself pronounced

unsatisfactory. On the other hand the result in the Ninth Circuit was based on a full and complete elucidation of the matter.

The sake imported into the United States comes from Japan and nearly all of it is entered at ports within the Ninth Circuit (the importations at New York during 1907 were invoiced at $2,245; in 1908 they were less). If the writ asked for is denied the classification adopted by the Circuit Court of Appeals at San Francisco will, naturally, be accepted everywhere as correct and no difficulties in administering the law need be expected.

We respectfully submit that the prayer of the petition should be denied.

HENRY M. HOYT,
Solicitor-General.
JAMES C. MCREYNOLDS,
Special Assistant to the Attorney-General.
NOVEMBER, 1908.

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Office Supreme Court, U. S.
FILED
MAR 26 1909
JAMES H. McKENNEY,
Clerk

No. [redacted]220.

In the Supreme Court of the United States.

OCTOBER TERM, 1908.

KOMADA & CO., PETITIONER,

v.

THE UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

MOTION TO ADVANCE.

In the Supreme Court of the United States.

OCTOBER TERM, 1908.

KOMADA & CO., PETITIONER,
v.
THE UNITED STATES.
No. 488.

MOTION TO ADVANCE.

In behalf of the United States, the Solicitor-General moves the court to advance the above-entitled cause and set it for hearing at an early day during the next term.

This case involves the classification, for tariff purposes, of sake, a beverage made in Japan from rice, containing 18 per centum of alcohol with an invoice value of about 50 cents per gallon. The petitioners primarily maintain that it is a nonenumerated manufactured article dutiable at 20 per centum ad valorem (10 cents per gallon) under the following provision, tariff act, 1897:

> SEC. 6. That there shall be levied, collected, and paid on the importation of all raw or unmanufactured articles, not enumerated or provided for in this act, a duty of ten per centum

> ad valorem, and on all articles manufactured, in whole or in part, not provided for in this act, a duty of twenty per centum ad valorem.

In a secondary way they suggest that it may be dutiable at 20 cents per gallon because similar to ale, porter, or beer (par. 297).

The Government maintains that by reason of similitude (sec. 7) to still wine, sake is subject to a duty of 50 cents per gallon, the charge imposed by paragraph 296 of the tariff act of 1897, upon such wine when containing more than 14 per centum absolute alcohol.

The question in issue has been in controversy and litigation for many years.

In *United States* v. *Nishimiya* (131 Fed. Rep., 650) the United States Circuit Court of Appeals for the Second Circuit adjudged that sake was dutiable at 20 per centum as a nonenumerated manufactured article. The Government refused to accept that decision as determinative of the proper classification, and the present case was instituted in the ninth circuit. The Circuit Court of Appeals there sustained the Government's contention, and, upon petition of Komada & Co., this court, at the present term, granted a writ of certiorari bringing up the whole matter.

The question is important, the amount involved large—estimated at more than $1,000,000; and thousands of protests are now suspended awaiting the final action of this court. Others are being rapidly added. The conflicting opinions in the two circuits may produce unfortunate embarrassments and work

injustice unless the present cause is speedily determined. Both the Government and the importers desire an early authoritative settlement of the controversy.

I am authorized to state that the counsel for petitioners concurs in this motion.

HENRY M. HOYT,
Solicitor-General.

MARCH, 1909.

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KOMADA & CO. *v.* UNITED STATES.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 220. Argued November 29, 30, 1909.—Decided January 3, 1910.

The construction given by the Department charged with executing a tariff act is entitled to great weight; and where for a number of years a manufactured article has been classified under the similitude section this court will lean in the same direction; and so held that the Japanese beverage, sake, is properly dutiable under § 297 of the tariff act of July 24, 1897, c. 11, 30 Stat. 151, 205, as similar to still wine and not as similar to beer.

After a departmental classification of an article under the similitude section of a tariff law, the reënactment, by Congress, of a tariff law without specially classifying that article may be regarded as a qualified approval by Congress of such classification.

THIS case is before us on a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit. The question is the proper classification, under the tariff act of July 24, 1897, 30 Stat. 151, c. 11, of a Japanese beverage known as "sake." "Sake" is not named in that act, but § 7 (p. 205), frequently spoken of as "the similitude section," reads as follows:

"That each and every imported article, not enumerated in this act, which is similar, either in material, quality, texture, or the use to which it may be applied, to any article enumerated in this act as chargeable with duty, shall pay the same rate of duty which is levied on the enumerated article which it most resembles in any of the particulars before mentioned; and if any non-enumerated article equally resembles two or more enumerated articles on which different rates of duty are chargeable, there shall be levied on such non-enumerated

article the same rate of duty as is chargeable on the article which it resembles paying the highest rate of duty."

In November, 1904, petitioner imported some sake at the port of San Francisco, and, following prior rulings, the collector, under the similitude section, held it similar to still wine containing more than fourteen per cent of absolute alcohol, and dutiable accordingly at fifty cents per gallon, under paragraph 296 (p. 174). The petitioner protested and claimed that it was either a non-enumerated manufactured article, dutiable at twenty per cent ad valorem, under § 6 (p. 205), or, by reason of similitude to ale, porter or beer, at twenty cents per gallon under paragraph 297 (p. 174). Both the board of general appraisers and the Circuit Court sustained the protest, feeling themselves constrained by the decision of the Circuit Court for the Southern District of New York (*Nishimiya* v. *United States*, 131 Fed. Rep. 650) and that of the Circuit Court of Appeals for the Second Circuit, (*United States* v. *Nishimiya*, 137 Fed. Rep. 396; *S. C.*, 69 C. C. A. 588). On appeal, the United States Circuit Court of Appeals for the Ninth Circuit reversed the decision of the Circuit Court and sustained the classification made by the collector.

Mr. Thomas Fitch and *Mr. W. Wickham Smith*, with whom *Mr. John M. Thurston* was on the brief, for petitioner:

Under the similitude section of the tariff act the similitude must be substantial. *Arthur* v. *Fox*, 108 U. S. 125; *Murphy* v. *Anderson*, 96 U. S. 131.

In cases of doubtful classification of articles the construction is to be in favor of the importer. *Powers* v. *Barney*, 5 Blatchf. 202; *Adams* v. *Bancroft*, 5 Sumner, 384; *Hartranft* v. *Wiegmann*, 121 U. S. 609; *Am. N. & T. Co.* v. *Worthington*, 141 U. S. 468; *United States* v. *Wiggleworth*, 2 Story, 369; *United States* v. *Davis*, 54 Fed. Rep. 147; *Matheson & Co.* v. *United States*, 71 Fed. Rep. 394; *Hempstead & Sons* v. *Thomas*, 122 Fed. Rep. 538.

While the highest rate of duty will be imposed where the

similitude is equal, yet, in determining whether there is or is not an equality, the doubt will be resolved in favor of the importer. *Tiffany* v. *United States*, 112 Fed. Rep. 672; *Re Guggenheim Smelting Co.*, 112 Fed. Rep. 517; *United States* v. *Dana*, 99 Fed. Rep. 433; *Re Herter Bros.*, 53 Fed. Rep. 913; *Mandell* v. *Seeberger*, 39 Fed. Rep. 760. And see also *United States* v. *Wotton*, 53 Fed. Rep. 344; *United States* v. *Schoverling*, 146 U. S. 76; *Von Bernuth* v. *United States*, 146 Fed. Rep. 61; *Hahn* v. *United States*, 100 Fed. Rep. 635.

Methods of manufacture are to be considered in determining similitude. *Weilbacher* v. *Merritt*, 37 Fed. Rep. 85; *Greenleaf* v. *Goodrich*, 101 Fed. Cas. 1168; aff'd 101 U. S. 278.

There is no force in the suggestion that the decision in the *Woozens Case*, G. A. 2786, establishes any rule of construction. That rule can only be invoked after long continued practice in the same case. *Merritt* v. *Cameron*, 137 U. S. 542; *United States* v. *Johnson*, 173 U. S. 363, 377; *Cross* v. *Burke*, 146 U. S. 82, 87.

The doctrine of commercial designation does not apply, and if it did the weight of evidence is against the Government.

That sake is not a spirituous beverage is shown by numerous decisions, six of state, two of Federal, courts besides one of this court. The testimony of five importers and two Government appraisers shows that sake is not a wine by commercial designation. Statistics of Japanese immigration show that the commercial world has never acquiesced in its classification as a wine. The rulings of the internal revenue department show that there it has for years been classed and taxed as a beer. The customs laws show that the quantity of alcohol in a beverage is not the test by which it is classified. The evidence conclusively shows that in material from which made, in process of manufacture, in chemical composition, in stability, in taste and in manner of use there are wide dissimilitudes between sake and still wine.

The sole similitude between wine and sake is in alco-

holic strength. The General Board of Appraisers, the United States Circuit Court for the Southern District of New York, the United States Circuit Court for the Second Circuit and the United States Circuit Court for the Northern District of California all decided that the one similitude in alcoholic strength was not sufficient as against the many dissimilitudes to establish a substantial similitude between sake and wine. The United States Circuit Court of Appeals for the Ninth Circuit decided that the one similitude of alcoholic strength overcomes all dissimilitudes.

Mr. J. C. McReynolds, Special Assistant to the Attorney General, with whom *The Attorney General* was on the brief, for the United States:

The action of the collector is presumptively correct and the burden is on the importers to establish their contention; the judgment of the Circuit Court of Appeals should be approved, therefore, even though this court should think the weight of evidence against that conclusion. *Arthur* v. *Unkart*, 96 U. S. 118; *Earnshaw* v. *Cadwalader*, 145 U. S. 247, 262; *Erhardt* v. *Schroeder*, 155 U. S. 124; *United States* v. *Ranlett*, 172 U. S. 133, 146. Similarity is a question of fact. *Herman* v. *Miller*, 127 U. S. 363, 370.

As this classification has existed since 1894 no hardship whatever has been imposed on the importer. *United States* v. *Hermanos*, 209 U. S. 337. And see *Robertson* v. *Downing*, 127 U. S. 607; *United States* v. *Healy*, 160 U. S. 136; *United States* v. *Falk*, 204 U. S. 143; *Hill Bros.* v. *United States*, 151 Fed. Rep. 476; *Morningstar* v. *United States*, 159 Fed. Rep. 287.

The similitude clause has long been a part of tariff legislation. See tariff act of 1842 and all subsequent ones. *Stuart* v. *Maxwell*, 16 How. 150, 160. As to the construction of that clause see *Arthur* v. *Fox*, 108 U. S. 125; *United States* v. *Roessler Co.*, 137 Fed. Rep. 770; *Greenleaf* v. *Goodrich*, 101 U. S. 278, 283; *Weilbacher* v. *Merritt*, 37 Fed. Rep. 85; *Mandell* v. *Seeberger*, 39 Fed. Rep. 760; *Keary* v. *Magone*, 40 Fed.

Rep. 873; *Re Herter Bros.*, 53 Fed. Rep. 913; *United States* v. *Dana*, 99 Fed. Rep. 433; *Hahn* v. *United States*, 100 Fed. Rep. 635; *Tiffany* v. *United States*, 112 Fed. Rep. 672; *Re Smelting Co.*, 112 Fed. Rep. 517; *Waddell & Co.* v. *United States*, 124 Fed. Rep. 301; *Rich* v. *United States*, 177 Fed. Rep. 293.

Sake is similar to still wines as measured by use, quality and material, and although there may be some similarity to beer there is a greater similarity to still wine.

MR. JUSTICE BREWER, after making the foregoing statement, delivered the opinion of the court.

Something can be said on both sides of the question of similarity, and if the case turned simply upon that question it might be difficult to reach a satisfactory conclusion. In such a case the construction given by the Department charged with the execution of the tariff acts is entitled to great weight. As said by Mr. Justice McKenna, delivering the recent opinion of the court in *United States* v. *Hermanos*, 209 U. S. 337, 339:

"We have said that when the meaning of a statute is doubtful great weight should be given to the construction placed upon it by the department charged with its execution. *Robertson* v. *Downing*, 127 U. S. 607; *United States* v. *Healey*, 160 U. S. 136. And we have decided that the reënactment by Congress, without change, of a statute which had previously received long continued executive construction is an adoption by Congress of such construction. *United States* v. *Falk*, 204 U. S. 143, 152."

In the decision of this case Mr. Justice White and Mr. Justice Peckham concurred solely because of the prior administrative construction.

Prior to 1894 sake was classified by similitude to distilled liquor and subjected to a duty of $2.50 per proof gallon under paragraph 329, act 1890, 26 Stat. 567, 589, c. 1244, and $2 under Schedule A, act 1883, 22 Stat. 488, 494, c. 121.

In July, 1894, Y. Woozeno protested against this classification, claiming the liquor was dutiable under the act of 1890 by similitude to still wine. He was sustained by the Board of General Appraisers in opinion dated October 4, 1894 (T. D. 15392, G. A. 2786). The Treasury Department acquiesced, and has acted accordingly until the present time; no protest against the practice was entered until March, 1902. Three years after the ruling in the Woozeno case, Congress passed the tariff act of 1897, which in no way modified the provisions upon which the appraisers had previously based their decision. This in effect confirmed their action. In March, 1902, Hackfeld & Co., Honolulu, protested against the classification of "sake" by similitude to still wine, but the prior ruling was sustained by the appraisers and the importer acquiesced in the decision. In the tariff act of 1909 sake is specially enumerated with still wine, (paragraph 307):

"Still wines, including ginger wine or ginger cordial, vermuth, and rice wine or sake, and similar beverages not specially provided for in this section, . . . if containing more than fourteen per centum of absolute alcohol, sixty cents per gallon." 36 Stat. 11, 40, c. 6.

In April, 1903, Nishimiya imported some sake at New York, and protested against the classification by similitude to still wine. The board of appraisers sustained the collector, but on appeal to the Circuit Court for the Southern District of New York the Circuit Judge thought that sake was not sufficiently like either wine or beer to be classified by similitude, and held it to be a non-enumerated manufactured article. This conclusion was sustained by the Circuit Court of Appeals for the Second Circuit. *United States* v. *Nishimiya, supra.*

Thus it appears that prior to 1894 sake was classified by similitude to distilled liquor, and then on a protest by an importer it was classified by similitude to still wine, and that ruling has been followed from that time to the present, receiving in the meantime at least a qualified approval by

Congress. It was accepted without challenge until 1902. Then, a protest against it having been overruled, it remained unchallenged for another year. After this, and in the latest tariff act, Congress has in terms put sake in the category with still wines.

Under these circumstances we think the intent of Congress in respect to the classification of sake is clearly manifested, and the judgment of the Court of Appeals is

Affirmed.